



THE LAW
OF
BILLS, NOTES, AND CHEQUES

THE LAW
OF
BILLS, NOTES, AND CHEQUES

BY
MELVILLE M. BIGELOW

PH.D. HARVARD

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TO
THE RT. HON. SIR EDWARD FRY,
Of the Privy Council,
SOMETIME LORD JUSTICE OF APPEAL.

PREFACE.

THE law of Bills, Notes, and Cheques has been codified in many of the States lately, beginning in 1897 with the Negotiable Instruments Law of New York. That has made a new edition of this work necessary.

The opportunity has been taken to make certain improvements of a mechanical nature, in aid of the reader. The subject has been broken up in various places, and the lines of division made plainer to the eye. Side-notes have also been added.

The New York Statute is given in full at the end of the book, and constant reference made to it in the text and notes.

It is to be regretted that the Statute is not free from avoidable defects, and that these defects have been copied more or less in other States. The American Bar Association, which promoted the project and framed the bill for carrying it out, may think it advisable, after a few years' trial of the present Statute shall have made clear the changes needed, to offer to the country a new draft of the law.

M. M. B.

CAMBRIDGE, August 2, 1900.

NOTE.

The citation 'N. I. L.,' or 'The Statute,' means the Negotiable Instruments Law, given at the end of the book. The citation 'Cases' means Bigelow's Cases on Bills, Notes, and Cheques, Students' Series.

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BILLS, NOTES, AND CHEQUES.

CHAPTER I.

LAW MERCHANT.

§ 1. LAW MERCHANT AND THE COMMON LAW: GENERAL THEORY.

LAW merchant, *lex mercatoria*, is a term in use wherever the English language prevails, to designate certain branches of law imported at different times into England, and matriculated there, from the Continent of Europe, where they formed part of the modern Roman or Civil law. We are concerned in this book with a branch which deals with the law of bills, notes, and cheques. This branch of the law merchant has retained throughout its life, to the present day, its essential characteristics, clearly marking it off from the common law, while other branches have differed so little from the common law or have become so far assimilated to it that the fact is all but forgotten that they are not of the common law stock. The result is that the term law merchant at the present time usually suggests the law of bills, notes, and cheques. That will be sufficient justification for the use of the term in this book.

Law merchant
an importation:
use of the
term in this
book.

The common law, on the other hand, was a native of England, already venerable when the law merchant crossed the English Channel. Before that time the common law had defined and settled the conception of contract for England.

Common law,
a native of
England.

The law merchant was no part of the law of England for generations after it had followed trade, in a private capacity, to

the British Islands. Unlike admiralty and equity, it was for centuries a sort of tolerated outlaw, living only as the merchants could keep it alive in those self-governing and self-supporting tribunals of theirs called the pie-powder or dusty-foot courts,¹ and carrying out its judgments only by pressure upon those who came within its extra-legal jurisdiction. But it lived in England as elsewhere upon the vital principle of determined usage in business, and hence was not foredoomed to die.

The time came when it must take its place, even if piecemeal, by the side of the common law, and of admiralty and equity, in the jurisprudence of England. With sound credentials in hand, it knocked for admission; but it knocked at the gates, not of its ancient kinsmen equity or admiralty, but of the common law which claimed the land. It is a curious question what might have happened had the gates not opened. Admiralty had already been exercising jurisdiction over instruments in the nature of bills of exchange and promissory notes pertaining to contracts in the commerce of the high seas;² and there was not

¹ See Scrutton, *Mercantile Law*, chapters 1, 2.

² In the first third of the 16th century Admiralty was taking jurisdiction as of course of the enforcement of such instruments as the following:—

Exhibited in the High Court of Admiralty of England on the 3^d of March, 1533.

Be it known to all men that I Thomas Thorne haberdasher of London have taken up by exchange of Thomas Fuller merchaunt of the staple of Callys the sum of lx pounds sterling the which sum of thre skore pounds sterling to be payd to the said Thomas Fuller *or to the brynger* of this byll in manner and forme foloyng that is to wyte the xxiiij daye of August next after the date of this byll to pay xxx pounds sterling and the xx day of September next foloyng to pay other xxx pounds sterling to the which payments well and truly to be payd to the sayd Thomas Fuller *or to the brynger* hereof at the days before wrytten I the said Thomas Thorne bynd me myne ayres executors and assignes and all my goods In wytnes whereof I the sayd Thomas Thorne have wrytten this byll wythe myne owne hand subscrybyd my name and sett to my seale the xvij daye of Aprill anno m^cxxviiijth

per me THOMAS THORN

Fuller v. Thorne, *Select Pleas in the Court of Admiralty*, Selden Society, p. 41. As to the proceedings and judgment in the case see *id.* p. 179. There

wanting intimation that the Chancellor of England might be ready to receive the new applicant.¹ Had the Admiralty secured its hold, or Chancery acquired general jurisdiction over our subject, or had the custom been adopted as it was, with its own courts and powers, it is certain that the law of bills and notes would not have been what it is. The doctrine of consideration, of joint contracts, and other things foreign to law merchant, would hardly have appeared.

But the custom applied for admission at the hands of common lawyers, to common law judges, at the common law courts; and the applicant could not hope for success except by putting on the common law garb. Fictions were accordingly resorted to in the pleadings, by which it was made to *seem* that the custom was after all nothing but a sister of the common law. Suit was brought in *assumpsit*, upon a foreign bill of exchange, alleging in effect, by a fiction of factorage or agency, that the defendant, acceptor of the bill, had, at the hands of his foreign factor, received money from the plaintiff, in consideration whereof he now, in accepting the bill drawn by his factor for the purpose, promised to repay the same.² Here were both consideration and privity of contract, of the common law. The courts winked at the allegations, accepted the fictions as not to be traversed,³ and called for proof only of what was left.

Thus foreign bills of exchange, received into the law on their own feigned likeness to simple contract, were brought within

are other interesting cases of the kind in the same volume. *Gale v. Browne*, id. p. 55, a 'byll' in sets, in which Browne acknowledges 'that I owe unto you Thomas Gale haberdasher of London x pounds x sh. The which . . . I promise . . . to pay unto the sayd Thomas Galle or to his assigns within xx dais after the save ariving of the said good shipe into the ryver of Temys,' etc. A. D. 1536. *Hurste v. Barnyes*, id. p. 72, 'bill obligatory,' promising to pay to Barnyes 'or John Flowde or any of your [Barnyes'] assygnes.' A. D. 1538.

¹ See *Dunlop v. Silver*, 1 Cranch, 367; *Cases*, 1, at p. 3.

² *Rastell's Entries*, 10 (1st ed. anno 1564); *Dunlop v. Silver*, 1 Cranch, 367; *Cases*, 1, 3, 5.

³ *Cases*, 6.

the jurisdiction of judges at that time educated, not in the law merchant, but in the common law only, with all which that fact

implies; and in the hands of the common law judges they have always remained. Inland bills followed and took their place in the same manner.

Promissory notes met energetic opposition from the common law judges, especially from Lord Holt,¹ but were at last admitted, on the footing of inland bills, by an Act of Parliament in the reign of Queen Anne.² Cheques followed in due course.³ And all, like foreign bills, fell into the hands of the common law judges, and have there remained.

Why the law merchant, or rather the custom of merchants, applied for admission into the English law is plain. It was not

because it was defective in principles and needed to be supplemented by another system of law; it was a complete and adequate body of custom, which by long use had proved itself equal to its purpose, so far as its contents were concerned. What the custom of merchants wanted, what it asked for in seeking admission to the law, was a *sheriff*; and that only. Its customers were becoming refractory; pressure was not enough to compel them; the arm of the law was needed to enforce its judgments.

This then is the cardinal fact, that the custom did not need or want the common law. But the custom fell into the hands

of the common law judges, and the natural result followed—the judges took every opportunity to assimilate the subject to the common law; with the result, not always to the advantage of the law merchant, that the newer law bears many marks of the common law. The fact has not been steadily kept in view, that the law merchant is only a legalized body of custom, fully developed, and to be administered in sound theory accordingly. In sound theory the appeal, in a disputed case, should be to the custom, or the law as the

¹ *Clerke v. Martin*, Ames, Cases on Bills and Notes, ii. 525; *Dunlop v. Silver*, Cases, at pp. 9, 10.

² 3 & 4 Anne, c. 9, anno 1704.

³ *Grant v. Vaughan*, 3 Burr. 1516, anno 1764.

embodiment of the custom; in default of custom or law, the dispute should be decided upon legal, not necessarily common law, reasoning consistent with law merchant.

As a matter of fact the appeal, in cases in which neither custom nor law is plain, has generally been to the common law. The result has been proper enough in most cases, as for instance in the very common and important matter of interpretation. But it has not always been so in other matters; perhaps not always in interpretation.

In some cases the original custom, after generations of time, has been forgotten if it was ever known by the common lawyers, and some doctrine of the common law, plainly contrary to it, has been fastened upon the law merchant. The doctrine of joint contract, with its refinements, is an instance, and an instance which has worked serious harm to the law merchant. By the custom, as by the modern law merchant on the Continent, joint parties to contract, such as partners, were not merely liable individually after judgment against them jointly, but (as should be true because they were ultimately liable individually on the judgment) they were *suable* individually. But this rule of the custom was set aside, probably in ignorance that it had ever existed, for the narrow technical rule of the common law, adopted on reasoning peculiar to that law, whereby the joint parties were treated as an indivisible body. By the first-named rule each party could be sued separately, until satisfaction; by the second one suit only (with certain exceptions) was possible, though it was not brought against all.¹

Another instance of the kind may be seen where in some States an actual piece of existing custom has been overturned by applying (doubtful) common law doctrine to the case. The instance referred to is the application of the so-called *parol evidence rule* of the common law (which excludes contemporaneous *parol evidence* to vary the terms of a written contract) to blank indorsement of a negotia-

Custom sometimes forgotten: joint contract.

Parol evidence rule applied to law merchant.

¹ See Bigelow, Estoppel, 104-111, 5th ed.

ble instrument. It is said, where the notion prevails, that the indorsement, being blank, is not a written contract, and hence that the rule does not apply; it may be shown accordingly that the understanding of the parties to the indorsement was that it was not to create liability.¹ This quite overlooks the fact that the law merchant has its own way of exempting indorsers (and others) from liability, and that is, by writing appropriate words of exemption, such as 'Without recourse,' in connection with the signature. This, it is believed, is the only way known to the law merchant of exempting a party to the instrument from liability.

Other instances of the kind might be given; but these will suffice. The mischief of them lies in the mistaken notion implied, that the law merchant is a sort of poor relation of the common law, or rather that it is a dependent of the common law, subject to it wherever its own language is not plain. Such instances, in other words, overlook the fact that the law merchant is an independent, parallel system of law, like equity or admiralty. The law merchant is not even a modification of the common law; it occupies a field over which the common law does not and never did extend.

But the notion of the generality of the common law is abroad; so much so that it has been asserted that there is nothing peculiar even in that most essential doctrine of the law merchant by which equities are cut off.² This, it is said, is no more than estoppel by the 'general' law. The suggestion would hardly have met with favor in the time of Lord Holt; he and those before him looked upon the custom as something extremely hostile to the common law of England. If in reply it be said that the estoppel referred to is of comparatively recent origin, as it is, the result will only

¹ *Espy v. Ross*, 66 Penn. St. 481; *Harrison v. McKim*, 18 Iowa, 485; *Rogers v. Bedell*, 97 Tenn. 240; *United States Bank v. Geer*, 55 Neb. 462.

² See an article in the *Law Quarterly Review*, for April, 1900, on *Negotiability and Estoppel*, by John S. Ewart, Q. C. Further see *infra*.

be this, that the common law has been expanding and taking on ideas which might perhaps have been sufficient for law merchant had they existed early enough. But that does not lead to the conclusion that the common law is to be considered as the source to be drawn upon in settling questions of the law merchant. It does not show that the law merchant is not a distinct branch of law, sufficient unto itself. The custom of merchants is still the custom of merchants, though men may, by estoppel in other things, bring about like results. 'Nullum simile est idem.'

The point to be insisted upon is the right of the custom to govern itself, and to be treated as governing itself, however closely something else may resemble it. It is the right of business to make its own laws, and to be looked to directly as doing so. Custom made law merchant, and it is to little purpose to say that the common law has found out another way to like results; or rather it is misleading to say so, for it is putting one on the wrong scent.

Right of the custom to govern itself.

'Law' then 'should follow business';¹ it should not divert or anticipate the course of business, except for most urgent reasons. Certain portions of the Negotiable Instruments Law may accordingly be criticised. The Statute does not always *follow* business. Thus the Statute has an article on acceptance, and another on payment, of bills of exchange for honor;² but there is nothing like a custom in this country, such as prevails in England, to accept or pay bills for honor. What custom may do or seek to do may not be foreseen; the Statute may embarrass the course of business here. Freedom of contract is the clear note of sound political economy, and should therefore have its course.

Law should follow business: the recent Statute.

¹ In these words the author quotes a serious remark made to him by the late Lord Bowen, in a conversation concerning the decision of the Court of Appeal in the great case of the *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 612 (affirmed, 1892, A. C. 25), in which his lordship (then Lord Justice Bowen) had just delivered his well-known opinion. The words quoted, it is confidently believed, contain the very substance of sound legal theory.

² Articles xiv., xv.

§ 2. CONSIDERATION: GRACE: NEGOTIABILITY.

Law merchant, in regard to bills, notes, and cheques, is a particular law of consideration, grace, and negotiability.

A special doctrine of consideration, differing in manifestation from that of the common law, arose in the very outset, by rea-

Peculiar doctrine of consideration: production of instrument.

son of the fiction before referred to. Consideration was stated in the fiction, and (the allegation not being traversable) therefore did not require proof.

In later times the fiction was dropped, and the allegation simply ran, that the defendant became liable by the custom of merchants. That allegation in turn was dropped, and a short statement of consideration finally took its place, where it has remained.¹

The net result has been that the production of the instrument raises, against any party to it, whether maker, drawer, acceptor, or indorser, at least where the instrument is negotiable,² a presumption that his undertaking is supported by a valuable consideration.³ In other words, the general presumption of *liability* which prevailed under the custom before its matriculation into law, has been converted into the narrower presumption of consideration of the present day.

How this differs from the rule of the common law in regard to simple contract in writing is plain. By the common law the plaintiff in such a case is bound to give some actual evidence of consideration; production of the writing is not enough, unless

¹ On the history of this branch of the subject see *Dunlop v. Silver*, Cases, 6-11, and the cases and notes in Professor Ames's *Cases on Bills and Notes*, ii. 520-538. On the difficulties of suing in debt see *Milton's Case*, Ames, ii. 520; *Bishop v. Young*, id. 532.

² As to non-negotiable instruments there is a conflict of authority. See Bigelow's *L. C. Bills and Notes*, 23; and among other cases *Carnwright v. Gray*, 127 N. Y. 92, in favor of the presumption, and *Sidle v. Anderson*, 45 Penn. St. 464, contra. The Statute relates only to negotiable instruments.

³ N. I. L. § 31. The plaintiff does not lose the benefit of the presumption by offering evidence to show consideration. *Durland v. Durland*, 153 N. Y. 67. Partial failure of consideration between immediate and like parties may be shown, at least by statute. *Burgess v. Nash*, 66 Vt. 44; *Hoyt v. McNally*, id. 48.

its language itself shows what is required. But as regards the very nature of consideration there is no difference between the law merchant and the common law; the common law doctrine has been fully fixed upon the law merchant in this respect.¹

Grace is a short period of time extended by the unwritten law to the parties to instruments not payable on demand, in ease of providing payment. It arose before the age of steam, when communication was slow and often difficult. It is said to have been a mere matter of indulgence at first, at the holder's election; however that may be, custom finally established it as matter of right in favor of the defendant. The rule is peculiar to the law merchant; and the reason for it having mostly ceased, it has been abolished by the Statute.²

What grace is and how it arose: abolished by the Statute.

Negotiability in the law merchant is the property whereby the bill, note, or cheque passes, or may pass, from hand to hand like money, so as to give a holder in due course the right to hold the instrument and collect the sum payable, for himself, free from defences. The common law originally knew nothing of the kind, except in regard to money and the English (not American) doctrine of 'market overt.' Much progress has been made in the common law, in one way or another, towards negotiability, not merely in the sense of the *transferrability* of choses in action, but of the right, by way of estoppel, of the transferrer to collect the same for himself free from defences; but it is misleading to say that negotiability in the law merchant is therefore only a matter of estoppel by the 'general' law of our day.³ Negotiability in the law merchant arose in and rests upon custom alone. Estoppel is only a very late analogy; no authority on the law of bills, notes, or cheques has ever questioned the basis of the law or intimated that it was a matter of estoppel,

What negotiability in law merchant is: common law estoppel.

¹ There is possibly a difference between the two, due to the persistent and just pressure of custom touching bills and notes, in cases of transfers by debtors to their creditors of securities for a pre-existing debt.

² N. I. L. § 92.

³ See Mr. Ewart's clever article, already referred to.

however true it is that estoppel has been referred to as conferring a kind of negotiability upon certain instruments of the common law.¹

To be negotiable the instrument must be payable to bearer or to order, in terms or in plain meaning; and by the unwritten law merchant it should not be under seal. The Form of words for negotiability: seal. latter rule is changed by the Statute; which provides that the negotiable character of the instrument shall not be affected by affixing a seal to it.² And it had before been held that the negotiability of paper of a corporation was not taken away by putting it under seal.³

¹ See the cases quoted in Mr. Ewart's article. Of course Mr. Ewart does not deny that negotiability in the law merchant is due to custom, but his article argues that the law merchant, as regards its chief feature negotiability, is now lost in the general i. e. common law doctrine of estoppel.

² N. I. L. § 13, 4.

³ Chase Bank v. Faurot, 149 N. Y. 532; Marine Manuf. Co. v. Bradley, 105 U. S. 175; Mercer County v. Hackett, 1 Wall. 83. The coupons of a corporation are promissory notes. Boyer v. Chandler, 160 Ill. 394. Certificates of deposit payable to order are negotiable, by custom. Kirkwood v. First National Bank, 40 Neb. 484. So of course of the certification of cheques.

CHAPTER II.

GENERAL DOCTRINE.

§ 1. DEFINITIONS.

A PROMISSORY note is a written promise, and a bill of exchange a written order upon a person, to pay to a certain person or order, or to the order of a certain person,¹ or to bearer,² a certain sum of money, absolutely.³ A cheque is a written order upon a bank or banker to pay on demand⁴ (otherwise as in the case of a note or bill).⁵ 'Draft' is a term of convenience, signifying either a bill of exchange or a cheque, but more commonly the former. Bills of exchange and cheques are foreign or inland; those drawn in one state or country and payable in another are foreign;⁶ all others are inland. Paper is negotiable only when made payable, in terms or plain intent, to 'order,' or to 'bearer.'

The different
instruments of
law merchant.

Bills of exchange, especially foreign bills, are often drawn, for safety of transmission, in a numbered set of two or more, each containing a provision in effect that it is payable only in case the others are unpaid. Where a bill is so drawn the whole of the parts therefore will constitute but one bill.⁷

¹ N. I. L. § 15.

² Id. § 16.

³ Id. §§ 133, 191.

⁴ See Id. § 14.

⁵ Id. § 192. The promise or the order is 'written' if there is a written signature to it.

⁶ N. I. L. § 136. *Bank of United States v. Daniel*, 12 Peters, 32. But see *Grimshaw v. Bender*, 6 Mass. 156; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Buckner v. Finley*, 2 Peters, 586; making the residence of the drawer and drawee the test. That cheques may be cheques though drawn in one country and payable in another, see *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Roberts v. Corbin*, 26 Iowa, 315.

⁷ N. I. L. § 185.

The following are examples of the three kinds of instrument:—

1. Boston, Jan. 1, 1892. Six months after date I promise to pay to A (or to A or order, or to the order of A, or to bearer) One Thousand Dollars. Value received. B.

2. (Date.)¹ Thirty days after sight (or after date, or at sight) pay (as above). Or, pay this first of exchange, second and third unpaid. To C (individual, partnership, bank or other corporation).

3. (Date.) Pay (as above, 'Value received' being usually omitted). To the Eagle Bank, Boston.

The law however prescribes no particular form of words for any of these instruments; it is satisfied if the essentials of the instrument are stated, however inartificially.²

§ 2. PARTIES.

The person who executes a promissory note is called the maker, not the drawer; the person who executes a bill of exchange is called the drawer, not the maker; the person who executes a cheque is generally called the drawer, sometimes the maker. The names, through carelessness or indifference, are now and then confused; but the contract of the maker of a note differs radically from that of the drawer of a bill, and it is best therefore to give to each its recognized name. The contract of one who executes a cheque is anomalous; it is not that of drawer of a bill or maker of a note; but on the whole the better usage gives to the person the name of drawer.

The person to whom, by name, a note, a bill, or a cheque is made payable is called the payee; the person upon whom a bill or a cheque is drawn, that is, the person called upon to make payment, is called the drawee, and in case of acceptance by him (the instrument being a bill of exchange), acceptor. When the payee, or other person at the same time or afterwards, puts his name upon the paper,

Maker and
drawer to be
distinguished.

Payee:
drawee:
indorser.

¹ See N. I. L. § 13, 1; §§ 19, 20.

² See N. I. L. § 24; also id. §§ 12, 13.

the act is called indorsement, and the party an indorser. The person to whom the paper is then or afterwards passed is called indorsee or holder. The term holder is sometimes applied to the payee; the term indorsee is applied to a holder after an indorsement, even though the indorsement be not immediately to him.

Parties absolutely liable are called primary parties, and are said to be primarily liable. Other parties are called secondary parties, and are said to be secondarily liable.¹

§ 3. DELIVERY.

The contract of the defendant is not complete, and no action upon the instrument can be maintained against him, even by a holder in due course, until he has delivered the instrument.² And delivery imports more than Instrument must be delivered. handing over to another; it imports such a transfer of the instrument to another as to enable the latter to hold it for himself. If the defendant has only put the paper into the hands of his agent, or of a custodian, to hold accordingly, he has not delivered it any more than if he had passed it from his right hand to his left; he has only enabled the agent or custodian to deliver it. Theft from the agent or custodian would be nothing more than theft from the defendant.

Delivery may be by intention, by agency, or by negligence, and, it seems, in no other way. But the defendant may estop himself to deny delivery.³ Delivery by intention Modes of delivery. is often called actual delivery; while delivery without intention is often called constructive delivery. But 'constructive' delivery is delivery as fully as is 'actual'; the terms are somewhat misleading and of no special use.

Delivery of the instrument by intention, that is, transferring it to another with intent that he shall hold it for himself, includes mistake. A thing done in mistake is done intentionally,

¹ N. I. L. § 3.

² *Burson v. Huntington*, 21 Mich. 415; *Cases*, 227; *Middleton v. Griffith*, 57 N. J. 442. See *Baxendale v. Bennett*, 3 Q. B. Div. 525. But see N. I. L. § 23, which is not clear.

³ See post, pp. 202-205.

though the effect or result may not be in the mind and hence may not be intended. I may desire to send a letter to A, but if in consciousness I send it to B, though under mistake, the sending is intentional. I have adopted the means whereby the letter goes to B, and that is enough.

Delivery of the instrument by agency may not be delivery by intention of the *principal* at all; it may be delivery contrary to his intention, and even against his orders. And agency in the law merchant has a wider meaning than the term has in the common law. This fact seems to have been overlooked in some cases. Thus it has sometimes been supposed that where the instrument has been put into the hands of a mere custodian, one, that is to say, having nothing to do but to keep it, the rule of agency does not apply if in violation of his trust the custodian transfers it. The custodian is not an agent according to the common law, and not being held out as an agent, he cannot bind the defendant, it is said, by transferring the instrument.¹

It is true that a mere custodian is not even a special agent, in the law of agency in general; but it does not follow that he may not be treated as an agent in the law merchant. The law merchant may well have a doctrine of agency of its own. Mercantile interests require special protection in the purchase of negotiable instruments, and, by custom, it may well be enough to confer title, that the defendant has enabled the custodian to pass the instrument to a bona fide holder for value.²

Delivery by negligence imports that the instrument has passed into circulation, without intention or agency, by the

¹ *Chipman v. Tucker*, 38 Wis. 43; *Roberts v. McGrath*, id. 52; *Roberts v. Wood*, id. 60. See *Carter v. Moulton*, 51 Kans. 9.

² The Wisconsin cases above cited are not supported by the authorities to which they refer. *Burson v. Huntington*, 21 Mich. 415; *Cases*, 227; *Baxendale v. Bennett*, 3 Q. B. Div. 525. These were cases in which the paper was stolen. The cases of *Walker v. Ebert*, 29 Wis. 194, and *Kellogg v. Steiner*, id. 626, were also distinguishable; they were cases of fraud in the very being of the contract, so that no contract was ever executed. *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Cases*, 237.

defendant's failure to exercise reasonable care in keeping it in his hands, as for instance in a den of thieves or gamblers or in a brothel. But it would not be enough that the instrument passed into circulation by reason of some remote negligence of the defendant. The defendant's negligence, to make it a case of delivery, should have been in the very matter of the instrument's passing into circulation.¹ Hence where the instrument passed out of the defendant's possession into the hands of another, after the defendant had kept it in a negligent way for awhile, but not by reason thereof, there has been no delivery by the defendant's negligence. Custom has not established any rule upon the subject, and the rule of law must therefore rest upon legal reasoning.²

Delivery by intention is of course valid in all cases ; delivery by agency within the scope of the agent's authority is valid, even though in violation of the defendant's instructions, if the instrument was transferred to a holder in good faith without notice; delivery by negligence is probably valid only in favor of a holder in due course.³

Distinctions touching kinds of delivery.

The defendant may then show, against any holder, that he never delivered the instrument in any way; unless indeed he has estopped himself from doing so.⁴ Assuming however that there has been a delivery by the defendant, it should be noticed that delivery ordinarily is not the subject of any stipulation or term of the instrument, and hence, though proved, is still a subject for evidence, between the parties to the act and those similarly situated, in regard to its real import. Between the parties and against holders with notice or without consideration, delivery may then be shown to have been upon some condition or stipu-

Evidence as to delivery: conditional delivery.

¹ See *Merchants of Staple v. Bank of England*, 21 Q. B. Div. 160 ; *Swan v. North British Co.*, 2 Hurl. & N. 175, 182 ; *Arnold v. Cheque Bank*, 1 C. P. D. 578 ; *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389 ; *Bank of England v. Vagliano*, 1891, A. C. 107, 115, 135, 136, 170, 171 ; *Baxendale v. Bennett*, 3 Q. B. Div. 525 ; *Bigelow, Estoppel*, 655-659, 5th ed.

² Negligence in delivery should not be confused with want of care by which a forgery has been made easy. See as to the latter post, pp. 217-220.

³ Further, see post, pp. 202-205.

⁴ On that point see post, pp. 202-205.

lation which has not been met or has been violated.¹ Thus it might be shown that the instrument was delivered merely in escrow, for some special purpose which has not been accomplished, or which, when accomplished, required a return of the instrument to the defendant.²

Some courts have gone still further, and permitted evidence, between immediate and like parties, annulling altogether the effect of a real delivery, even against the maker of a promissory note, upon the specious suggestion that it may be shown that the delivery was conditional. Thus it has been held, upon such a suggestion, that it may be shown that the delivery was upon the 'condition' that the defendant should be under no liability upon his signature.³ But that certainly is perverting the rule that the delivery may be shown to be conditional. Conditional delivery necessarily imports possible liability, liability upon the happening or performance of the condition; it is a contradiction to say that a condition of itself can destroy liability. The terms of the contract creating liability, whether written or imported by the law merchant, are not, in sound reason, to be circumvented and wholly annulled, as they would be by declaring that the delivery was conditional.

To say then that a signature is to be without recourse against the signer is not to say that the delivery is to be conditional; exemption from recourse is exemption from liability. The idea of exemption relates only to liability, and is perfectly consistent with delivery; the common case of indorsement in terms 'without recourse' plainly shows the fact. Indorsement 'without recourse' is no evidence of want of delivery or of any condition pertaining to the act of delivery.⁴

¹ N. I. L. § 23; *Higgins v. Ridgway*, 153 N. Y. 130; *Benton v. Martin*, 52 N. Y. 570; *Seymour v. Cowing*, 4 Abb. Ct. App. Dec. 200; *Labbee v. Johnson*, 66 Vt. 234; *Smith v. Munsetter*, 58 Minn. 159. But see *Henshaw v. Dutton*, 59 Mo. 139; *Hubble v. Murphy*, 1 Duval, 278.

² *Smith v. Munsetter*, supra. Not, it must be noticed, against a holder in due course. *Lookout Bank v. Aull*, 93 Tenn. 645.

³ *Higgins v. Ridgway*, and other New York cases, supra.

⁴ The misleading New York doctrine is opposed, in principle at least, to *Beecher v. Dunlap*, 52 Ohio St. 54; *Wilson v. Wilsou*, 26 Oreg. 251; *Woods*

§ 4. ESSENTIALS OF CONTRACT : DEFENCES.

The law merchant adopts the doctrines of the common law in regard to the essentials of contract; whatever the form of the contract in question, — whether that of maker, acceptor, drawer, or indorser, or other party, — it must be supported by valuable consideration, there must be agreement, and the parties liable must be competent to contract. And that is true, not only between immediate parties, but between mediate or remote parties as well. Thus, there must be a valuable consideration, not merely to support an action by the payee of a promissory note against the maker, — there must somewhere be a valuable consideration to support an action against the maker by the payee's indorsee. So if there be a want of agreement between the maker and the payee, there will be a want of agreement, upon the same facts, between the maker and the payee's indorsee; and so if the maker is incompetent to contract with the payee, he is incompetent to contract with the payee's indorsee.

Law merchant
adopts common
law doctrine.

So also of defences; all defences of the common law are defences, so far as they are available under the doctrine of negotiability, in the law merchant. The question in other words is not whether a defence good by the common law is good by the law merchant, but whether the defence can be alleged against the particular plaintiff, who may be an indorsee or the like.

§ 5. MATURITY OF THE CONTRACT.

The contract reaches what is called its maturity as soon as it is due, that is, at the earliest time when demand of payment is authorized; its maturity is past, and the contract is overdue,

v. Schaeffer, 173 Mass. 443; *Hall v. First National Bank*, id. 16; *Heist v. Hart*, 73 Penn. St. 286, 289; *Henshaw v. Dutton*, 59 Mo. 139; *Hubble v. Murphy*, 1 Duval, 278; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110, 115; *Smith v. Munsetter*, 58 Minn. 159. The oral condition in some of these cases related indeed to the contract, but there is no sound distinction between such cases and treating an understanding of exemption from liability as a condition in the delivery of the instrument. See *Minneapolis Threshing Machine Co. v. Davis*, *supra*.

on the following day, whether the following day be a secular or a non-secular day. If then the instrument is entitled to grace, it will reach its maturity in the morning of the last day of grace, at a reasonable hour, and not before that day; if it is not entitled to grace, it will reach its maturity as if it were a common law contract, except as the subject may be regulated by statute.¹ An instrument payable on demand, in terms, in legal effect, or by statute, is due, or at maturity, from the moment of delivery, that is, without grace, and is overdue after known demand,² or after the lapse of a reasonable time,³ or as statute may declare.

As the undertaking is not overdue until the day of maturity has passed, no action on the instrument can in principle be maintained before that time. Some confusion exists, however, in the authorities upon this point, arising probably from the fact that there may be a *dishonor* of the instrument on the day of its maturity, — a dishonor for the purpose of giving valid notice thereof on that day. But there may well be a dishonor for the purpose of notice, upon a demand and refusal, on the day of maturity, though there may be no dishonor on that day for the purpose of suit.⁴ The better rule therefore is, that the parties to the instrument are entitled to the whole of the day of maturity, and are exempt from suit accordingly.⁵ And this too whether the parties are primarily or secondarily liable.

¹ See N. I. L. §§ 78, 82, 92, 93.

² *Nash v. De Freville*, 1900, 2 Q. B. 72, 87.

³ N. I. L. § 78.

⁴ *Kennedy v. Thomas*, 1894, 2 Q. B. 759, C. A.

⁵ *Kennedy v. Thomas*, *supra*; *Wiesinger v. First National Bank*, 106 Mich. 291; *Sutcliffe v. Humphreys*, 58 N. J. 42; *Osborn v. Moncure*, 3 Wend. 170; *Smith v. Aylesworth*, 40 Barb. 104; *Oothout v. Ballard*, 41 Barb. 33; *Bevan v. Eldridge*, 2 Miles (Penn.) 353; *Taylor v. Jacoby*, 2 Barr, 497; *Smith v. Bank of Washington*, 5 Serg. & R. 318 (suit against indorser). *Contra*, *Staples v. Franklin Bank*, 1 Met. 43; *Estes v. Tower*, 102 Mass. 65; *Veazie Bank v. Wynn*, 40 Maine, 62; *Greeley v. Thurston*, 4 Greenl. 479; *Flint v. Rogers*, 3 Shep. 67; *Wilson v. Williman*, 1 Nott & McC. 440; *Dennie v. Walker*, 7 N. H. 201; *Coleman v. Ewing*, 4 Humph. 241.

According to *Sutcliffe v. Humphreys*, *supra*, suit upon an instrument pay-

The question of the time when suit can be brought has usually arisen in the case of instruments entitled to grace; but grace cannot create any peculiarity in the matter. The day of the maturity will (or will not) be too soon for suit whether the instrument is entitled to grace or not. The question of the time for making presentment, for the purpose of fixing the liability of secondary parties, will be considered in a later chapter.

able at bank cannot be brought even after banking hours of the day of maturity. The maker in all cases has the whole of the day.

The day of maturity may be hastened by agreement in the instrument that default in paying interest or instalments of the principal shall make the whole sum payable thereupon. *Fant v. Wickes*, 10 Texas Civ. App. 394; *Wilson v. Campbell*, 110 Mich. 580; *Carlon v. Kenealy*, 12 M. & W. 139; post, p. 31.

CHAPTER III.

REQUISITES : ANALYSIS OF DEFINITION.

[The student should refer to the definitions given ante, p. 11.]

§ 1. WRITTEN PROMISE : WRITTEN ORDER.

PROMISSORY notes, bills of exchange, and cheques must be in writing; no oral promise or order would be treated on the same footing, though the oral undertaking might be a perfectly good contract, a contract of the common law. The requirement of a writing is a requirement of the law merchant as derived from the custom of merchants.¹ The whole instrument must be in writing, and all the terms necessary to constitute it a bill, note, or cheque must be found within the four corners of the piece of paper upon which it is written.² So far as the primary contract is concerned, or so far as the original instrument is an order, it must on its face so plainly declare itself as to leave no place for external evidence further than to identify the parties designated by it. A promise to pay the amount of one's debt would be an example; however certain the sum due, the instrument would not be a promissory note because of the necessity of resorting to external evidence to prove the amount payable. The requirement of the law merchant in this particular (as in many others) is unique; but the reason is obvious — the instrument is currency, and could not run on crutches.³

The law merchant has never prescribed any particular writing material, or any particular material for receiving the writing.

¹ The Statute only affirms the previous law. N. I. L. § 8, 1.

² Compare *Sperry v. Horr*, 32 Iowa, 184; Cases, 15, 16.

³ The reason in strictness applies to negotiable instruments only; but the rule itself probably extends to non-negotiable bills, notes, and cheques as well.

The instrument may be written with pencil as well as with ink,¹ and, it seems, upon any material firm enough of itself to hold the writing.

A promissory note in common form, as shown in the example,² contains a promise, expressed by that word. That however is unnecessary,³ but what will satisfy the rule, which requires a promise, is not clearly determined. It is generally laid down that the promise must be express; hence that the mere fact that a debt is acknowledged is not enough, for that at best would but raise an *implied* promise. For example: 'Due C & B \$17.14' is not, it seems, a promissory note, for want of an express promise to pay.⁴ The reason for the rule is plain; were it not for the requirement of an actual promise, every debt and every sum due for tort might be turned into a promissory note by *acknowledging* it in writing.

But to say that a promise must be express is not to say that the word 'promise' must be used; a promise is express when either the word 'promise,' or any equivalent word or expression, is used.

What is the equivalent of 'promise'? The question has proved troublesome. It is a question of interpretation of what amounts to a declaration of the maker's *will* to pay; but interpretation has sometimes gone well *Equivalent of promise.* afield in the matter. Setting any certain time for payment in express terms appears to be accepted as an equivalent; and this even though the words of time are 'on demand.' For example: 'Due J A \$94.91 on demand' is a promissory note; it being deemed an express promise to pay.⁵ The use of words of negotiability is also treated as an equivalent. For example: 'Due R, or bearer, \$200.26.' This on like ground is a promis-

¹ See *Geary v. Physic*, 5 Barn. & C. 234; *Brown v. Butcher's Bank*, 6 Hill, 443; *Reed v. Roark*, 14 Texas, 329.

² Ante, p. 12.

³ N. I. L. § 8, 2, does not require the use of the word 'promise,' though it declares that the instrument must contain a 'promise.'

⁴ See *Currier v. Lockwood*, 40 Conn. 349.

⁵ *Smith v. Allen*, 5 Day, 337; *Kimball v. Huntington*, 10 Wend. 675.

sory note.¹ The use of the words 'for value received' is held insufficient. For example: 'Due C & B \$17.14, value received,' is not a promissory note; the words 'value received' neither import, nor are an equivalent of, 'promise.'² And so it has been held of the words 'to be accountable' in an instrument such as this: 'I have received the sum of £20 which I borrowed of you, and I have to be accountable for the said sum with interest.'³

When an equivalent of 'promise' is used, it matters not how the acknowledgment of debt is made. The foregoing would be examples of what are commonly called 'due bills' (with an actual promise). Another way in which the acknowledgment is sometimes made, oftener in England than in this country, but sometimes here, is by what is called, from the letters used, an 'I O U.' For example: 'I O U £20 to be paid on the 22d inst.' is a promissory note.⁴ Again: 'S has deposited in the State Bank \$1000, payable to himself on return of this certificate,' is a good promissory note, though a certificate of deposit.⁵

It is no more necessary in the case of a bill of exchange that the word 'order' be used than that the word 'promise' be used in a promissory note. Any equivalent word or expression will satisfy the definition; but it seems here that the law does not give such loose rein to interpretation as we have just seen in regard to the word 'promise.' That is, the equivalent word or expression is to be a real equivalent, in the common acceptation. Still it is not necessary that the words, literally taken, should be imperative; the language may be that of courtesy and politeness in form, as often it is, and yet be imperative in the eye of the law.

¹ *Russell v. Whipple*, 2 Cowen, 536.

² *Currier v. Lockwood*, 40 Conn. 349; two judges dissenting.

³ *Horne v. Redfearn*, 4 Bing. N. C. 433. See *White v. North*, 3 Ex. 689, 690. 'To be accountable' was deemed to mean that credit would be given in account and the balance paid. But see *Miller v. Austin*, 13 How. 218.

⁴ *Brooks v. Elkins*, 2 Mees. & W. 74.

⁵ *Klauber v. Biggerstaff*, 47 Wis. 551; *Beardsley v. Webber*, 104 Mich. 88.

Enough that the language used is an expression of the drawer's *will* that the money shall be paid. For example: 'Please let the bearer have \$50. I will arrange it with you this noon' is a good bill of exchange, as containing an 'order' to pay.¹ Again: 'Mr. B will oblige Mr. A by paying C or order \$100' would be a good bill on the same footing. A little less however might be fatal. For example: 'Please let bearer have £7, and place it to my account, and you will much oblige me' is *deemed* not a bill of exchange for want of an 'order' or the equivalent.² Again: 'We hereby authorize you to pay on our account to the order of G, £6000' at certain times, in stated instalments, is not a bill of exchange, for the same reason.³

§ 2. NECESSARY PARTIES.

In the case of a promissory note there must be a maker, and, unless the note is made payable to bearer, a payee. In the case of a bill of exchange or a cheque there must be a drawer, a drawee,⁴ and, unless the instrument is payable to bearer, a payee. But all these parties, that is maker and payee in the case of a note, drawer, drawee, and payee in the case of a bill or a cheque, may be the same person. It will only be necessary to comment here upon the subject of the payee.

§ 3. THE PAYEE.

The instrument may be payable to a person named, or to order, or to bearer. A, the payee, may be the person who made the promise or drew the order; but in such ^{To whom} a case there is obviously no contract or right of payable. action upon the instrument (unless it is a bill of exchange, or a cheque, which the drawee, being a third person, has undertaken to honor), since a man cannot contract with himself. This

¹ Bissenthall v. Williams, 1 Duv. 329.

² Little v. Slackford, Moody & M. 171. Sed quære.

³ Hamilton v. Spottiswoode, 4 Ex. 200.

⁴ If no drawee is named in a draft, the instrument may be treated as a promissory note, or, it is said, as a bill of exchange. Funk v. Babbitt, 156 Ill. 408. Compare N. I. L. § 24, 5.

remark will serve to explain certain words of the Statute in the definition of a promissory note. Such an instrument, the Statute declares, is a promise 'by one person to *another*.' ¹ That is not to be taken to mean that the promise may not, in *terms*, be made to the promisor; ² it means that the instrument is not complete in the hands of the promisee when he is the same person as the promisor.

The payee must be a person certain, that is, existing, and must be ascertainable at the time of the execution of the instrument, unless the instrument is payable in terms or in legal effect to bearer. Certainty of the parties is as much of the essence of the instrument as certainty in any other respect. But the payee need not in any case be named individually; if he is described sufficiently to be identified, that is enough. For example: 'Pay to the executor of A, deceased,' is sufficient to satisfy the law merchant. ³ It is no objection that identification must be made by external evidence; identification indeed would be necessary even when the party's individual name was given in the instruments; though possession of the instrument would be presumptive identification. Even a mistake in the name of the payee may, it seems, be corrected in a suit upon the instrument. ⁴

The instrument is payable to order where it is made or drawn payable to the order of a specified person, or to him or his order.

When payable to order: two or more payees. It may be payable, by the Statute, to the order of two or more payees jointly. ⁵ By the Statute it may also, contrary to the current of unwritten law, ⁶ be payable to the order of 'one or of some of several payees'; ⁷

¹ N. I. L. § 191.

² Id. § 15, 2.

³ Adams v. King, 16 Ill. 169; Cases, 14.

⁴ Jacobs v. Benson, 39 Maine, 132.

⁵ N. I. L. § 15, 4.

⁶ Osgood v. Pearsons, 4 Gray, 455; Blanckenhagen v. Blundell, 2 Barn. & Ald. 417; Walrad v. Petrie, 4 Wend. 575; Willoughby v. Willoughby, 5 N. H. 254; Quinby v. Merritt, 11 Humph. 439; Cases, 11. See also Carpenter v. Farnsworth, 106 Mass. 561. But see Westgate v. Healy, 4 R. I. 523; Hopkins v. Halliburton, 6 Texas Civ. Ap. 451.

⁷ N. I. L. § 15, 5.

and it may be payable to the order of the holder of an office for the time being.¹ There is probably no *custom* authorizing instruments to be made payable to the order of less than all the payees (if there be more than one), except by way of agency.

An instrument payable to the order of the cashier or other fiscal officer of a bank is, by the law merchant, payable presumptively to the order of the bank as the principal.² And the Statute has extended this rule to corporations generally.³ This is an exception to the general rule, that the instrument itself must disclose the parties to it; but it is an exception which the custom first created, and stands therefore on solid ground. The effect of the rule, whether under the Statute or not, appears to be to permit indorsement either by the agent or by the principal.

Payable to
cashier of cor-
poration.

An instrument may be made payable to bearer either in terms or by implication of law. It may be so payable by implication of law in various ways. One way would be to make use of some word or phrase not purporting to be the name of any person, as for instance, 'Pay to bills payable or order,' or to 'sundries,' 'cash,' or the like.⁴ Another way of making an instrument payable to bearer, where it is not

Payable to
bearer.

¹ N. I. L. § 15, 6. By the Bills of Exchange Act, 'A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees . . . also . . . to the holder of an office for the time being. § 7, (2).

² First National Bank v. Hall, 44 N. Y. 395; Lookout Bank v. Aull, 93 Tenn. 645 (that the bank in such a case may sue, without indorsement by the payee-cashier; as to which the rule is said to have been otherwise, formerly). See Falk v. Moebs, 127 U. S. 597, as to which see Hatley v. Pike, 162 Ill. 241, 245.

³ N. I. L. § 49: 'Where an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.'

⁴ N. I. L. § 16, 4. See Mechanics' Bank v. Stratton, 3 Keyes, 365; Willets v. Phoenix Bank, 2 Duer, 121.

so in terms, but in terms is payable to order, would be for the person to whose order it is payable to indorse it in blank.¹

Making the instrument payable to the order of a fictitious or non-existing person has given trouble. It is agreed by the authorities that if the maker or drawer of the instrument knew that such 'person' was fictitious or non-existing, the paper is payable to bearer. Fictitious or non-existing payee. And some authorities consider it essential to treating the paper as payable to bearer, that the maker or drawer should, when executing the instrument, *know* that the payee is a fictitious or non-existing person.² Other authorities declare that notwithstanding the fact that the maker or drawer supposed that the payee was a real person, still indorsement (though wrongful) of the name of the fictitious or non-existing payee makes the instrument payable to bearer in the hands of a holder for value without notice.³ Perhaps, indeed, the instrument would be payable to bearer, according to these authorities, as it was executed; that is, without any indorsement.

Neither the American nor the English Statute requires indorsement in such cases; the paper as executed in favor of the fictitious or non-existing payee is payable to bearer. But the two statutes differ like the authorities just mentioned. By the American Statute, the instrument, to be payable to bearer, must be executed by the maker or drawer with knowledge that the payee is fictitious or non-existing; while by the English Statute that is not necessary.⁴

¹ N. I. L. § 16, 5.

² 'Only such paper as is issued to a fictitious payee or indorsee by the party sought to be bound, with full knowledge of the fact, shall be treated as payable to bearer.' *Chism v. Bank*, 96 Tenn. 641, 645; *First National Bank v. Farmers' Bank*, 56 Neb. 149; *Armstrong v. National Bank*, 46 Ohio St. 512; *Shipman v. Bank of New York*, 126 N. Y. 318.

³ *Kahn v. Watkins*, 26 Kans. 619; *Clutton v. Attenborough*, 1895, 2 Q. B. 707, C. A., affirming *id.* 306, on the English Bills of Exchange Act. See also *Bank of England v. Vagliano*, 1891, A. C. 107, reversing 23 Q. B. Div. 243, and 22 Q. B. D. 103; *Meriden Bank v. First National Bank*, 33 N. E. R. 247, and 34 N. E. R. 608 (Ind.).

⁴ N. I. L. § 16, 3: 'The instrument is payable to bearer . . . when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.' The contrary is probably to be

§ 4. MONEY.

That all these instruments must be payable in money has always been held essential, and the custom of merchants to that effect has received the sanction of statute, — the statutes merely expressing the force of the custom. Thus in England, the Statute of Anne ^{Promise or order to pay money.} already referred to, by which promissory notes were adopted into the law, refers in terms to promises to pay 'money;' and the same word is used in the similar American statutes.¹

By 'money' is meant, in strictness, that which by law is tenderable for debt, that is, assuming that no provision is made for payment in anything else. If the instrument is not payable in money, or in what the courts ^{What is meant by 'money.'} judicially know to be equivalent to money, it is not an instrument of the law merchant. For example: 'We promise to pay A or order \$1000 in cotton' is not a promissory note.² Again: 'Pay to A or order £1000 in good East India bonds' is not a bill of exchange (or a cheque).³ Again: 'I promise to pay A or order \$140 in carpenter's work' is not a promissory note.⁴ Again: 'Pay A or order \$1000 in current funds' or 'in currency' is by some courts deemed not a bill (or a cheque).⁵

inferred where 'such fact' was not known to the maker or drawer. Bills of Exchange Act, § 7, 3: 'Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.'

¹ N. I. L. § 8, 2: A negotiable instrument must contain a 'promise or order to pay a sum certain in money.' The same would be true of a non-negotiable bill, note, or cheque, under the law merchant.

² Auerbach v. Pritchett, 58 Ala. 451.

³ Buller, N. P. 272; Chalmers, Bills, 13 (Benjamin).

⁴ Quinby v. Merritt, 11 Humph. 439.

⁵ Wright v. Hart, 44 Penn. St. 454. But see White v. Richmond, 16 Ohio, 5; Klauber v. Biggerstaff, 47 Wis. 551. See Frank v. Wessels, 64 N. Y. 155. It has often been held that instruments payable in current bank notes are not payable in money. See the cases just cited, and, among others, Little v. Phenix Bank, 7 Hill, 359, affirming 2 Hill, 425; McDowell v. Keller, 4 Cold. 258; Irvine v. Lowry, 14 Peters, 293. In Graham v. Adams, 5 Ark. 261, it was held that a note or bond payable 'in good current money of the State' was payable in gold and silver. To the same effect, Cockrill v. Kirkpatrick, 9 Mo. 688. Secus of a promise to pay 'in Arkansas money of the Fayetteville Branch.' Hawkins v. Watkins, 5 Ark. 481. Further, see the

Again: 'We promise to pay to the order of A, twelve months after date, in Buffalo, N. Y., \$2500, in *Canada* money,' being a New York contract, is not, it is held, a promissory note, because it is not payable in the money of this country or in what the court can judicially know to be the equivalent.¹

The rule itself is accepted by all courts ; but the courts have not been agreed in regard to its meaning, as cases referred to in the authority last cited show. Indeed, that authority itself has been criticised, though in a case clearly distinguishable.² The difficulty lies in what is to be accepted as judicially known to be equivalent to money. It is hardly safe to call anything the equivalent of money on the ground that it passes as such at certain places; such a rule would admit into the company of promissory notes promises to pay in wool or in tobacco, it may be, in some places, where in the absence of money such things may happen to pass current as payment. Nor is it safe to treat currency, unless it is the currency of the nation, as equivalent to money ; for currency is apt to fluctuate, that is, to fall from its face value. The most, it seems, that the law should allow would be a promise to pay in current money of a 'particular kind.'³

In some States promises to pay in things not money have been treated as standing in part on the footing of paper of the Payable not in law merchant. The presumption of consideration money.

has been applied to them ; while negotiability has been denied them.⁴ But the favor is generally considered as cases cited in *Thompson v. Sloan*, 23 Wend. 71. By N. I. L. § 13, 5, the validity and negotiable character of an instrument are not affected by the fact that it designates a particular kind of current money for payment.

¹ *Thompson v. Sloan*, 23 Wend. 71.

² *Black v. Ward*, 27 Mich. 191, 194. There has been an inclination to favor the paper where the sum is payable in the local State currency. *Mitchell v. Hewitt*, 5 Smedes & M. 361 ; *Drake v. Markle*, 21 Ind. 433 ; *Butler v. Paine*, 8 Minn. 324 ; *Cockrill v. Kirkpatrick*, 9 Mo. 688 ; *White v. Richmond*, 16 Ohio, 5 ; *Swetland v. Creigh*, 15 Ohio, 118.

³ *Jones v. Fales*, 4 Mass. 245, 254. See also *Denison v. Tyson*, 17 Vt. 549 ; *Dewey v. Washburn*, 12 Vt. 580.

⁴ N. I. L. § 13, 5. 'Current funds' now means national currency and therefore money. *Bull v. Bank*, 123 U. S. 105.

misplaced; the fact that the paper is payable in commodities being deemed enough to put it upon the footing of an ordinary contract of the common law.

§ 5. CERTAINTY OF SUM.

Further, the sum payable must be certain.¹ But the meaning to be given to the rule is in certain respects a matter of doubt. It is clear that the sum cannot be fluctuating so as to be unascertainable at the time of making the instrument, as where it is to rise or fall *indefinitely* according to the happening of an uncertain event. For example (hypothetical): 'Pay to A or order, thirty days after sight, \$1000 or less according to the market value of 10 shares of Moon Mining stock at that time' would not be a bill of exchange for want of designation of a sum certain. Meaning of certainty of sum.

Indeed upon the principle that the instrument should not call for external evidence, the case could not be different where the only uncertainty was between two fixed sums, as in the case of a promise or an order to pay \$1000, or \$500 if a particular event happened before the time of payment of the larger sum.² Here the sum would be ascertainable at the outset; it would be either \$1000 or \$500; there could be no indefinite fluctuation in such a case.³ But external evidence would be required, in regard to the happening of the event, which would be fatal. For example: 'Two years from date, for value received, we, or either of us, promise to pay to W or bearer \$60, with use; said W agrees that if \$50 be paid on the first day of January, 1843, it shall cancel this note;' that is deemed not a promissory note.⁴

Greater difficulty arises with regard to cases where the principal sum payable is certain, but to it something further is to be added in a subsidiary way, dependent upon some event, or un-

¹ N. I. L. § 8, 2. See also § 9.

² *Roads v. Webb*, 91 Maine, 406; *Marrett v. Equitable Ins. Co.*, 54 Maine, 537 ('with such additional premiums as may become due'); *Dodge v. Emerson*, 34 Maine, 96; *Fralick v. Norton*, 2 Mich. 130.

³ Compare the case of time of payment 'on or before,' *infra*, p. 30.

⁴ *Fralick v. Norton*, 2 Mich. 130.

certain in amount. In some parts of the country it is not uncommon to add to the principal sum promised another stated sum by way of attorney fee, in case suit should be brought upon the instrument. In many cases it has been held that this additional stipulation, if it does not operate until after dishonor, does not affect the nature of the instrument.¹ But in other cases the contrary is held;² and in some cases it is held that the addition may violate the usury laws, or other statutes, or public policy, and for that reason render the instrument void or subject to any special provision of the laws.³ Another instance of the difficulty occurs where payment is promised at a stated time 'or before,' with deduction of interest for the time if payment is made before the day set. Some of the courts have held that the sum payable is rendered uncertain by the uncertainty of the provision for anticipation;⁴ other courts would hold the contrary, on the ground that it is enough that the principal sum payable, in such cases, is certain.⁵ The latter is the better rule.⁶ Still another instance occurs where the promise to pay is 'with current exchange.' A similar conflict of authority exists in regard to such cases; but the better rule, and the weight

¹ N. I. L. § 9, 5; *Farmers' Bank v. Sutton Co.*, 6 U. S. App. 312; 3 C. C. A. 1; 52 Fed. R. 191; *Oppenheimer v. Bank*, 97 Tenn. 19; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kans. 433; *Garr v. Louisville Banking Co.*, 11 Bush, 180; *Stoneman v. Pyle*, 35 Ind. 103; *Nickerson v. Sheldon*, 33 Ill. 372; *Dietrich v. Bayhi*, 23 La. An. 767.

² *Woods v. North*, 84 Penn. St. 407; *First National Bank v. Gay*, 63 Mo. 33; *Roads v. Webb*, 91 Maine, 406, and cases cited.

³ *Witherspoon v. Musselman*, 14 Bush, 214; *Shelton v. Gill*, 11 Ohio, 417; *Myer v. Hart*, 40 Mich. 517.

⁴ *Stults v. Silva*, 119 Mass. 137; *Way v. Smith*, 111 Mass. 523; *Hubbard v. Mosely*, 11 Gray, 170.

⁵ See *Buchanan v. Wren*, 17 Texas Civ. Ap. 560; *Albertson v. Laughlin*, 173 Penn. St. 525; *Beatty v. Western College*, 177 Ill. 280, 289; *Helmer v. Krolich*, 36 Mich. 371; *Mattison v. Marks*, 31 Mich. 421, doubting *Hubbard v. Mosely*, *supra*. The question in these, as in some of the Massachusetts cases, related to certainty of time, but there would be the same question of certainty in amount ordinarily.

⁶ N. I. L. § 11, 2: 'An instrument is payable at a determinable future time,' when payable 'on or before a fixed or determinable future time specified therein.'

of authority, treat the provision as not affecting the subject of certainty of amount.¹

To make the instrument payable in stated instalments will not affect its character;² nor would indorsement of payments of the principal affect it, for it would still remain certain how much was due.³

Provisions accelerating, with certainty, the time of payment, on non-payment of interest, or of instalments of principal, when due have no effect upon the character of the paper; that is, they do not make the sum payable uncertain.⁴ For example: The defendant is guarantor ^{Accelerating time of payment.} and the plaintiff is holder of an instrument promising to pay a certain sum of money, with interest in instalments, and being thus far a promissory note, but with an added provision that in case of default in the payment of any instalment of interest when due, the principal sum shall, at the holder's election, at once become due. The instrument is a promissory note, the added provision not affecting it in that respect.⁵ The same would be true of a provision in regard to default in payment of any one of a series of notes.⁶

¹ N. I. L. § 9, 4: 'Whether at a fixed rate or at the current rate.' See also *Hastings v. Thompson*, 55 N. W. Rep. 968; *Smith v. Kendall*, 9 Mich. 241; *Johnson v. Frisbie*, 15 Mich. 286; *Sperry v. Horr*, 32 Iowa, 184. Contra, *Culbertson v. Nelson*, 93 Iowa, 187; *Lowe v. Bliss*, 24 Ill. 168. But 'payable by New York or Chicago exchange' would be a different thing. The instrument would be payable in bills of exchange, not in money. *First National Bank v. Slette*, 67 Minn. 425. See however *Bradley v. Lill*, 4 Biss. 473, where 'in exchange' was construed to mean 'with exchange.'

² N. I. L. § 9, 2.

³ *Smith v. Shippey*, 182 Penn. St. 24.

⁴ N. I. L. § 9, 2, 3: 'The sum payable is a sum certain,' though payable 'by stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due.'

⁵ *Sea v. Glover*, 1 Bradw. (Ill.) 335; *Fant v. Wickes*, 10 Texas Civ. Ap. 394; *Wilson v. Campbell*, 110 Mich. 580; *Carlton v. Kenealy*, 12 M. & W. 139.

⁶ *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268. It would be otherwise in such cases if the maturity of the instrument depended upon the election or action of a third person, not a party to it. *Wilson v. Campbell*, supra, at p. 586; *Brooks v. Hargreaves*, 21 Mich. 254. So too, no doubt, if it depended upon any other external evidence.

§ 6. 'ABSOLUTELY': CERTAINTY OF TIME.

It is an invariable rule, or a rule with at most but a single exception, that the promise or order must be absolute; any condition or contingency expressed in it would have the effect to reduce the instrument from the high level of the law merchant to the lower level of the common law.¹ The condition or contingency need not appear in terms, — 'upon condition,' 'if,' 'in the event that,' or the like, — in order to defeat the instrument as a contract of the law merchant; the same effect is produced if in substance and reality the promise or order is conditional or contingent.² Thus, to make the paper payable out of some particular designated fund would have that effect, in ordinary cases, because the fund might not exist or be available at the time of payment.³ For example: 'One month from date I promise to pay to A or order \$1000 out of the net proceeds of ore to be obtained from the mine in the lot of land this day conveyed to me by B' is not a promissory note, being payable upon the contingency of obtaining the required amount of ore out of the mine.⁴

It makes no difference that the event upon which the promise or order is made happens, or that the particular fund exists and is available when payment is due, so that the promise or order may be binding; it is fatal to the contract as a contract of the law merchant that when the promise or order was made, payment was dependent upon condition or contingency.⁵ For example: 'Due K \$1000 when he is twenty-one years of age' is not a promissory note, though K lived to become, shortly afterwards, twenty-one.⁶

¹ N. I. L. § 10.

² A savings bank order, in negotiable terms, but with the addition, even in the margin of the order, 'The bank book of the depositor must accompany this order,' is not negotiable. The words quoted make the order contingent on producing the bank book. *White v. Cushing*, 88 Maine, 339; *Iron City Bank v. McCord*, 139 Penn. St. 52.

³ *Id.*

⁴ *Worden v. Dodge*, 4 Denio, 159; *Averett v. Booker*, 15 Gratt. 163, 'out of any money in his [payee's] hands belonging to me.'

⁵ N. I. L. § 11, 3.

⁶ *Kelley v. Hemmingway*, 13 Ill. 604.

It may be remarked that an order to pay over the whole or any part of a specified fund will ordinarily amount to an assignment of the same,¹ and that that of itself would be fatal to the conception of a bill of exchange or a cheque. A bill or a cheque can rise no higher than an undertaking; it signifies a debt, not a transfer of money or other property.

Apart from statute, it will not affect the instrument under the law merchant that language is added to it, provided the additional language does not make the promise or order conditional or contingent. To add a provision for reimbursement,² in the case of an order to pay, would not affect the paper as a bill of exchange, for that would not be directing *payment* to be made out of the particular fund or source; and whether the fund or source for reimbursement existed or was available would make no difference. For example: 'Pay to the order of A \$1000, one month from date, and reimburse yourself out of funds in your hands due me' is a bill of exchange, regardless of the reimbursement clause³ or of the existence of any debt due the drawer. Again: 'On the 1st of August next please pay to G or order £600, on account of moneys advanced by me to S,' is a bill of exchange regardless of the clause following the sum.⁴ So too the consideration for the undertaking may be stated, if no condition is created in the promise or order. For example: 'Pay to A or order \$1000 one month from date, *for stock*' is a bill of exchange.⁵ It is perhaps immaterial, in the absence of statute, that the additional language may express a condition or contingency, provided that the condition or contingency is no part of the promise or order to pay. That is to say, to a note, a bill, or a cheque may be added a contract of the common law, as has already been stated.

¹ See *Attorney-Gen. v. Continental Ins. Co.*, 71 N. Y. 325.

² N. I. L. § 10, 1.

³ *Kelly v. Brooklyn*, 4 Hill, 263; *Coursin v. Ledlie*, 31 Penn. St. 506; *Corbett v. Clark*, 45 Wis. 403.

⁴ *Griffin v. Weatherby*, L. R. 3 Q. B. 753 (overruling *Banbury v. Lisset*, 2 Strange, 1211); N. I. L. § 10, 1.

⁵ See *Coffman v. Campbell*, 87 Ill. 98; N. I. L. § 10, 2.

It may sometimes require careful consideration to determine whether the additional language forms part of the promise or order. Thus, while it is clear that the fact that it is recited in an instrument promising to pay money, that other paper or property is deposited with it as collateral, and that the same may be sold if such instrument is not paid at its maturity, will not prevent that instrument from being a promissory note;¹ still if it is recited in the instrument that the instrument itself is held as collateral, it will be perceived upon reflection that the contrary is true and that the promise is now made conditional. For example: 'Six months after date I promise to pay to the order of myself \$2400, value received, to be held as collateral security for the payment of B's note, December 5th, 6 months, for \$968.41,' and other notes, is not a promissory note; for in legal effect it is a promise to pay *if* the notes to which it is collateral are not paid.² So too while an insurance note is not reduced to a contract of the common law by adding the words 'On policy 33,386,'³ the contrary would be true if the words were 'subject to the policy,' or the like.⁴

But the Statute, following custom and hence pursuing sound theory, declares that an instrument which contains an order or a promise to do anything in addition to the payment of money is not *negotiable*, with certain exceptions, to wit: The order or promise may be coupled with an indication of a particular fund out of which reimbursement is to be made, or a declaration that a particular account is to be debited with the amount, or a statement of the transaction which has given rise to the instrument.⁵ The Statute also permits the addition of provisions authorizing the sale of collateral securities on non-payment of the instrument at maturity, for confessing judgment, for waiving any law intended for the benefit of the obligor, and for giving

¹ N. I. L. § 12, 1.

² *Haskell v. Lambert*, 16 Gray, 592.

³ *Taylor v. Curry*, 109 Mass. 36. The policy provided for a set-off of notes due the company.

⁴ *American Bank v. Blanchard*, 7 Allen, 333.

⁵ N. I. L. § 10.

the holder an election to require something to be done in lieu of payment of money.¹

The promise or order is not conditional, touching parties primarily liable, by reason of the fact that it designates a particular place of payment; nor is acceptance conditional towards the acceptor, for designating a place of payment. It is not necessary to make demand of payment at that or at any other place in order to fix the liability of the maker or the acceptor; it is the duty of such party to come and pay.² For example: 'Three years and two months after date I promise to pay M or order, at the office of the Bank of the United States, at Nashville, \$4880.99, value received,' is a promissory note, and not conditional, touching the liability of the *maker*, upon demand at the place named or anywhere else.³ Nor is an instrument payable on condition of demand, against parties primarily liable, though it is in terms payable 'on demand.'⁴

It is obvious, and the fact has already been noticed incidentally, that the promise or order is not performable absolutely if the time of payment is not certain to come to pass. For example: 'I promise to pay to A or order \$1000 when the estate of B is settled up' is deemed not a promise to pay absolutely, because the estate of B may never be 'settled up.'⁵ Again: 'I promise to pay to A or order \$1000 as soon as crops can be sold or the money raised from any other source' is not a promise to pay absolutely.⁶ Again: 'At sight after the arrival and discharge of coal per brig G pay to the

¹ N. I. L. § 12. Compare *Kirkwood v. Smith*, 1896, 1 Q. B. 582, on § 83 of the Bills of Exchange Act. With the American Statute compare § 3, (2), (3) of that Act.

² N. I. L. § 77: 'Presentment for payment is not necessary in order to charge the person primarily liable on the instrument.' Id. § 147: 'An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.'

³ *Wallace v. McConnell*, 13 Peters, 136.

⁴ *Messmore v. Morrison*, 172 Penn. St. 300.

⁵ *Husband v. Epling*, 81 Ill. 172.

⁶ *Nunez v. Dautel*, 19 Wall. 560.

order of myself \$1500, value received,' is not an order to pay absolutely.¹

Certainty of time, however, does not mean a fixed and stated day of month and year; or as it is sometimes put, certainty here does not mean definiteness. Nothing is more common than promises to pay 'on demand,' or orders to pay 'at sight,' or at a certain time 'after sight;' sometimes indeed instruments are made payable 'after date' simply,² or 'on demand after date.'³ All such instruments are as good promissory notes or bills of exchange as if payment were to be made upon a day stated.

All that the law requires is that the time of payment shall be sure to arrive, as, for instance, in the case of a promise to pay on the death of a person named. Indeed, absolute certainty appears, by some decisions, not to be required; moral certainty being deemed sufficient, as in the case of a promise by the government to pay a sum when it pays certain other debts which it owes.⁴ But that doctrine cannot be founded upon any custom, and should be taken with hesitation.

Some confusion exists, as certain of the examples already given and others show, in regard to the meaning of the rule in cases in which the time of payment is left indefinite, without giving power to the holder to put an end to the indefiniteness. But by the better view such a state of things will not prevent the paper from being a promissory note (or a bill of exchange if one should ever be drawn in that way). If the time of payment is sure to come to pass sooner or later, that is enough; when, sooner or later, it does come to pass, the instrument may be sued upon, in case of breach, as a promissory note.

Time not defined: 'on or before.'

¹ *Grant v. Wood*, 12 Gray, 220.

² *Hotel Lanier v. Johnson*, 103 Ga. 604.

³ *Hitchings v. Edmands*, 132 Mass. 338; *Foley v. Emerald Brewing Co.*, 61 N. J. 428; *Crim v. Starkweather*, 88 N. Y. 340. In the first of these cases the instrument is held (by a majority of the court) to be due at once on demand; in the other cases it is held payable only after some reasonable lapse of time after date.

⁴ *Andrews v. Franklin*, 1 Strange, 24; *Evans v. Underwood*, 1 Wils. 262.

Confusion on this point has arisen in recent cases of promises to pay at a time stated 'or before,' at the maker's election.¹ But the instrument is payable at the time stated at all events; the time of payment is certain to come to pass; the maker may choose to shorten the matter, — that is all.² Another difficulty with such cases, arising from the fact that the total sum payable is in one sense uncertain, has already been noticed.³

No time of payment at all need be stated; the paper in that case will in law be payable on demand,⁴ and that, as has already been stated, is enough. The common cheque is a familiar example. An undertaking to pay within a reasonable time is said to meet the requirement of the law merchant; for a reasonable time is deemed sure to come. And undertakings have been construed as performable within a reasonable time where the matter of time was left wholly indefinite in the language used. The courts have indeed gone far beyond custom in interpreting 'reasonable time.' For example: 'I promise to pay to A or order, \$1000 when convenient' is construed a promise to pay within reasonable time, and hence within a time certain.⁵ Again: 'I promise to pay to A or bearer \$75, one year from date, and if there is not enough realized by good management in one year, to have more time to pay,' is construed to be a promise to pay within a year, or at the end of a reasonable time thereafter, if enough should not be realized out of the business within a year; and the promise is thus deemed to be performable at a time certain.⁶

Cases of the kind under consideration may perhaps be considered more properly as deciding that the instrument provides a time of payment rather than it is an instrument of the law merchant.⁷ In that view such instruments are simply valid

¹ *Stults v. Silva*, 119 Mass. 137; *Way v. Smith*, 111 Mass. 523; *Hubbard v. Mosely*, 11 Gray, 170.

² *Helmer v. Krolich*, 36 Mich. 371; *Mattison v. Marks*, 31 Mich. 421.

³ *Ante*, p. 30.

⁴ *Messmore v. Morrison*, 172 Penn. St. 300.

⁵ *Works v. Hershey*, 35 Iowa, 340.

⁶ *Capron v. Capron*, 44 Vt. 410.

⁷ See *Page v. Cook*, 164 Mass. 116 ('On demand after date . . . payable

contracts of the common law; certainly they are not instruments of the custom of merchants. It should be noticed that such cases call for external evidence of liability; which should prevent them from having a place in the law merchant.

The time of payment may be put at the election of the holder not merely by making the instrument payable in one payment on demand, but by making it payable in parts at instalments. the pleasure of the holder. For example: 'I promise to pay to A \$125 in such manner and proportion, and at such times and place, as A may require' is payable absolutely, being payable in law in instalments on demand.¹

Indeed, the time of payment may perhaps be put in the alternative, one of the alternatives being wholly uncertain, if the *holder* has his election which of the alternatives to take; that is, if the holder has the right to insist upon payment, at the time certain set in the instrument, the law merchant appears to be satisfied.

§ 7. SIGNATURE.

Any of these instruments may be signed in pencil as well as in ink;² and though it is unusual to sign in any other way than by writing the name, that is not necessary, provided only the signature adopted was intended as an execution of the particular contract. Any party may sign with his mark though able to write his name, and with the same effect in law as if he had written his signature,³ or he may substitute for his name a cipher, figures, or what he will; but if the name of the party is not signed, the holder has it to show that what the party did write was intended to answer

when payor and payee mutually agree'); *Black v. Bachelder*, 120 Mass. 171 ('payable as convenient'); *Hawkins v. Graham*, 149 Mass. 284; *White v. Snell*, 5 Pick. 425.

¹ *Goshen Turnpike v. Hurin*, 9 Johns. 217. See *Washington Ins. Co. v. Miller*, 26 Vt. 77; *White v. Smith*, 77 Ill. 351.

² *Geary v. Physic*, 5 Barn. & C. 234; *Brown v. Butchers' Bank*, 6 Hill, 443.

³ *Bliss v. Johnson*, 162 Mass. 323.

the purpose of a signature.¹ There must be a signature in some form upon the paper itself. It could not be shown that the want of a signature was due to mistake or oversight; though a suit in equity might, it seems, be maintained in a proper case to correct an omission in signing due to mistake.²

¹ See *Brown v. Butchers' Bank*, supra, where the figures '1, 2, 8' were held a good indorsement on evidence of the intention; and the same case, referring to *George v. Surrey*, *Moody & M.* 516, as to signature by mark.

² See *Lancaster Bank v. Taylor*, 100 Mass. 18; *Beard v. Dedolph*, 29 Wis. 136; *Brown v. McHugh*, 35 Mich. 50, 52. These are cases of omitted indorsement; but the principle is probably general.

CHAPTER IV.

MAKER'S CONTRACT.

§ 1. NATURE: SIGNATURE.

THE contract of the maker of a promissory note differs in one respect from that of any other party to a contract of the law merchant; the writing itself shows, apart from grace, what the contract, in terms, is. One has but to read the note to see that it is an absolute undertaking to pay.¹ No demand of payment is necessary to fix the maker's liability. And besides the express undertaking to pay, the maker, as incident to his contract, admits, in law, the existence of the payee (if a payee purporting to be an existing person is named), and his capacity at that time to indorse the instrument if it is payable to order.²

The contract of the maker may be executed in any way, so far as his signature is concerned. By custom the maker signs the note at the right lower corner; but the courts appear to have considered the custom as not binding. The name written by him in any part of the instrument has been treated as a sufficient signature if that was the intention. It may accordingly be written in the body of the promise, as where the note reads, 'I, A B, promise to pay,' etc., provided that it was intended that the name as written there should answer the purpose of a signature.³ The Statute makes no change; it simply defines a (negotiable) promissory note as a promise in writing, 'signed by the maker,' without limitation

¹ Evidence is inadmissible to show that an oral agreement to renew the note was made. *Woods Co. v. Schaeffer*, 173 Mass. 443; *Hall v. First National Bank*, id. 16; *Heist v. Hart*, 73 Penn. St. 289. Much less, that the maker was not to be held liable. *Gumz v. Giegling*, 108 Mich. 295.

² N. I. L. § 67.

³ *Taylor v. Dobbin*, 1 Strange, 399.

in regard to the place of the signature.¹ The courts have applied to the case a doctrine of the common law.

There is this distinction, however: Where the signature is placed at the end of the note, the intention is fixed; the signing in that way is an execution of the note as matter of law, in the absence of fraud practised upon the maker in regard to the instrument itself. But if the signature be out of the usual place, it is then a question of fact whether the supposed signature was intended as an execution of the instrument; the burden being upon the holder to show that it was so intended.²

The simplest kind of contract is the one now assumed to be in question, where the promise is made by one person only. That is the typical case, the case from which all others are more or less variants.

§ 2. JOINT AND SEVERAL SIGNATURE.

The note may be signed by more than one person; and then, according to the intention manifested, it will be the several note of each, or the joint note of all, or it will be either the one or the other as the holder may choose to treat it. The question which of these it is, will be a question to be ascertained from the writing itself. The language of the note may in terms state the intention; as where it reads, 'We jointly promise,' or 'We jointly and severally,' or 'We or either of us,' or 'I, A B, as principal, and I, C D, as surety, jointly and severally promise;' or the language may not in terms declare the intention. In the latter case the intention is a matter for construction, on the language used, the rule whereof appears to be this: If there is nothing to indicate a different intention, the promise of the makers is to be deemed joint. For example (hypothetical): 'We promise to pay to A or order \$1000, six months from date,' followed by the signatures of the makers, would be a joint promissory note, as there is deemed to be nothing in the language to indicate that the

What constitutes joint signature.

¹ N. I. L. § 191.

² Compare *In re Booth*, 127 N. Y. 109; *Watts v. Pub. Admr.*, 4 Wend. 168; *Catlett v. Catlett*, 55 Mo. 330; *Armstrong v. Armstrong*, 29 Ala. 538. These are cases of wills.

makers intended to bind themselves severally. On the other hand 'I promise to pay,' signed by more than one person, is a joint and several promise.¹

Where the promise is joint, there is this addition to the typical case of a promise by one person only, that the promise is now the indivisible undertaking of two or more.² Legal effect of joint contract: Apart from statute there is deemed to be but one several contract. right of action for the breach of the contract in such a case, and hence when that right of action is pursued to its end, obviously nothing more can be done. There are not as many rights of action as there are parties; and if suit should be brought against one without objection, and judgment should be obtained against him, then though the judgment should prove fruitless, no action could be brought against the others.³ Where the promise is several, there are as many rights of action — on which of course as many judgments may be obtained — as there are makers; though as there is but one debt, one satisfaction satisfies all rights of action and all judgments. Where the promise is joint and several, the holder has an election; he may treat the makers as liable in either way.⁴

One further point touching joint promises may be noticed. The promise may be made by partners or not. If made by Partners' contract. partners, any of the partnership may act for the firm; and accordingly, a *refusal* to pay, on the day of maturity, made by any one of the partners, would be a breach of contract by all, for the purpose of giving a valid notice of dishonor on that day, though not by the better rule, for the purpose of suit.⁵ But if the joint promisors were not

¹ Arbuckle v. Templeton, 65 Vt. 205; N. I. L. § 24, 7. See ante, p. 5.

² See ante, p. 5.

³ King v. Hoare, 13 Mees. & W. 494; Sessions v. Johnson, 95 U. S. 347; Bigelow, Estoppel, 104-109, 5th ed.

⁴ 'If two bind themselves by contract *jointly and severally*, they may both be joined as defendants in one action; or either or each of them may be sued in a *separate* action. For when the contract is in this form, the obligation created by it may be treated as either joint or several, at the election of the party who is entitled to recover for the breach of it.' Gould, Pleading, § 69.

⁵ Kennedy v. Thomas, 1894, 2 Q. B. 759, C. A.; Osborne v. Moncure, 8 Wend. 170; Smith v. Bank of Washington, 5 Serg. & R. 318 (suit against

partners, and no agency existed between them, there could be no breach of the contract before the close of the day of maturity, except by demand upon and refusal by all.

§ 3. SIGNING AS SURETY.

Another modification of the typical case occurs where one of the promisors undertakes as surety. If the fact of suretyship is shown upon the note, the holder must govern himself accordingly. The surety is still a maker, — that Legal effect. is, he promises to pay; but he promises sub modo, — he promises subject to certain restrictions imposed by the suretyship upon the holder of the note. The holder must not have dealings affecting the contract, such as agreements to extend the time of payment, behind the surety's back.¹ Otherwise, however, the surety stands in the same situation as the principal maker. If the fact of the suretyship is a private matter, understood only between the principal and the surety himself, it has no bearing upon the rights of the holder; towards him there might as well have been no special understanding. But should he have notice of the understanding at the time of taking the note, or should he afterwards receive or acquire notice, then, by the better view, he would have to govern his conduct as if the fact were shown upon the paper itself.²

§ 4. SIGNING AS AGENT OR REPRESENTATIVE.

How ought a man to sign a promissory note who intends to exempt himself from liability? This question arises constantly in cases of alleged (or actual) agency.³ A, who in point of fact is treasurer or otherwise agent or representative of B, has occasion to execute a Exemption of agent or representative. promissory note solely on behalf of B; how is he to do it? If indorser). But see *Staples v. Franklin Bank*, 1 Met. 43; *Estes v. Tower*, 102 Mass. 65; *Veazie Bank v. Wynn*, 40 Maine, 62; *Dennie v. Walker*, 7 N. H. 201; *Coleman v. Ewing*, 4 Humph. 241.

¹ On this subject see a later chapter.

² The case referred to in the text is suretyship in the ordinary sense, not in the sense which would make an accommodative acceptor, for example, a surety. As to cases of that sort, see *Farmers' Bank v. Rathbone*, 26 Vt. 19.

³ An agent to whom an instrument is payable or indorsed, as for collection,

he wishes to exempt himself, he should do so in terms or by plain if not necessary implication;¹ otherwise his signature — that is, signing his own name to the note — will bind him as maker, whether the principal is bound or not.

The agent or representative does not exempt himself from liability within the rule just stated — ‘in terms or by plain if not necessary implication’ — by adding words which are merely *descriptive* of the position which he holds.² It does not affect a man’s liability in a written (or a verbal) contract to describe himself; that at most serves but to identify him. Of this nature the law considers all such words as ‘agent,’ ‘trustee,’ ‘treasurer,’ ‘president,’ ‘guardian,’ or the like, following a man’s name.³ For example: ‘Two months after date pay to the order of T \$4469.76, value received, and charge the same to the account of D. F. & Co., agts. Piscataqua F. & M. Ins. Co.,’ binds D. F. & Co., the added words being deemed mere description of the position held by them; it does not indicate that the instrument was executed in their office or character of agents.⁴ Again: ‘One year from date we promise to pay to A or order \$1000, value received. A B, C D, trustees of First Parish,’ binds A B and C D, for the same reason.⁵

may of course sue thereon. *Lehman v. Press*, 106 Iowa, 389; *Illinois Conference v. Plegge*, 177 Ill. 431.

¹ N. I. L. § 27.

² *Hately v. Pike*, 162 Ill. 241; *First National Bank v. Wallis*, 150 N. Y. 455; *Ogden R. Co. v. Wright*, 31 Oregon, 150; *Farrell v. Reed*, 46 Neb. 258; *Bank v. Looney*, 99 Tenn. 278, 296; N. I. L. § 27: ‘The mere addition of words describing’ the signer ‘as an agent, or as filling a representative character, without disclosing its principal, does not exempt him from personal liability.’ Nor is it enough to disclose the principal; the undertaking should purport to bind the principal, in order to exempt the signer in *that* way. *Shoe & Leather Bank v. Dix*, 123 Mass. 148; *Cases*, 25; *Grafton Bank v. Wing*, 172 Mass. 513, 515; *First National Bank v. Wallis*, 150 N. Y. 455.

³ See *Falk v. Moebs*, 127 U. S. 597. But see as to this case *Hately v. Pike*, 162 Ill. 241, 245.

⁴ *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 101. It does not affect the case that the instrument was a bill of exchange, of which the ‘agents’ were drawers.

⁵ See *id.*; *Shoe & Leather Bank v. Dix*, 123 Mass. 148.

The general rule is plain, — the language must be interpreted by itself alone. If the principal is to be bound as a party to the instrument, the fact must appear in the instrument itself.¹ The application of the law to all but simple cases like those of the examples is, however, often troublesome, and consequently sometimes inconsistent. If in the first of the examples the signing had been 'D. F. & Co., agts. *for* Piscataqua F. & M. Ins. Co.,' it seems that D. F. & Co. would not have been liable. The instrument would, it seems, have shown 'in terms' that they were acting in their office and character of agents.² But if it had read 'D. F. & Co., agts. *of*,' etc., the language would probably have been treated as merely descriptive of the position held, and hence not as exempting the signers.³

On the other hand, while a signing by 'A B for C D,' or 'for C D, A B' is the note of C D, if authorized, though the name of C D is not mentioned in the body of the note, still if the note is signed by the name of the agent only, it is laid down that it is his note though the body of the instrument make it a promise 'for' or 'on behalf of' the principal.⁴

To exempt the 'agent' from liability, and to bind the principal on the instrument, in a case in which the agent might have acted in his character of agent, the agent ought to name his principal, and further express the intention to bind the principal alone, — that is, he should show that the act is the act of the principal. But that is not necessary merely to

¹ Fuller v. Hooper, 3 Gray, 334, 341; Slawson v. Loring, 5 Allen, 340, 342. An undisclosed principal cannot be made a party to a bill, note, or cheque, by external evidence, as he may be to a contract of the common law. Cases just cited. The difference between the two systems of law should be well noticed.

² Id., referring to Ballou v. Talbot, 16 Mass. 461, as an authoritative decision, where a note was signed 'J T, agent for D P,' and J T was held not liable. Jefts v. York, 4 Cush. 372; Page v. Wight, 14 Allen, 182. But see DeWitt v. Walton, 5 Seld. 571, where the signature 'D H, agent for the Churchman,' was held to bind D H.

³ Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101.

⁴ Barlow v. Congregational Society, 8 Allen, 460, 463. Further see Early v. Wilkinson, 9 Gratt. 68; 1 Daniel, Negotiable Instruments, 298; Mechem, Agency, 429 et seq.

exempt the agent. If he has exempted himself in terms, that will be sufficient. For example: 'We as trustees, but not individually, promise to pay,' etc., followed by the signatures of the makers (with the word 'trustees' added), the signers having authority to make the note as trustees, would not bind the signers personally.¹

It does not impose liability upon the 'agent' that words which alone would be mere description are added to the signature, if elsewhere the promise is put as the act of the principal (or as we have just seen, if the agent expressly exempts himself). For example: 'I, as treasurer of the Congregational Society, or my successors in office, promise to pay,' etc., signed 'S R, Treasurer,' is not the note of S R.²

If the supposed agent had not the authority he professed to have, he will be liable; by the better view, for breach of an implied warranty of authority and not as a party to the written instrument (as if he had signed it for himself).³ Whether this doctrine has been changed or not by the Statute is not clear. The Statute declares that if a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument 'if he was duly authorized.'⁴ The distinction is very important; for if the 'agent' is liable on the instrument, he will be liable, if the instrument is negotiable, to remote holders, which would not be true if he has only broken a warranty.

§ 5. ANOMALOUS SIGNATURE OF STRANGER.

The last variant from the typical case to be noticed is an anomalous kind of undertaking, which has given much trouble.

Indorsement not according to law merchant. The case is this: After a promissory note has been executed in the usual way, a third person, who may or may not have been a stranger to the consideration between the maker and the payee, puts his name

¹ Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101.

² Barlow v. Congregational Society, 8 Allen, 460.

³ Grafton Bank v. Wing, 172 Mass. 513; Draper v. Massachusetts Heating Co., 5 Allen, 338; Miller v. Reynolds, 92 Hun, 400. But see Taylor v. Davis, 110 U. S. 330; Ogden R. Co. v. Wright, 31 Oregon, 150.

⁴ N. I. L. § 27.

upon the back of the paper (or anywhere else, so that it is not with that of the maker), as a further assurance in favor of the payee.¹ Now this act, apart from statute, is not properly speaking an indorsement; while the paper is in the hands of the payee it cannot be indorsed by another, according to the unwritten law merchant; the payee of paper payable to order must be the first indorser. The contract in question is one 'which is not recognized by the law merchant' proper.²

It is true that the courts of some States treat the party as an indorser, as far as they can; such courts will not admit that he can be treated in any way as on the footing of a maker of the note, and probably that conforms to what was the actual intention in most cases; How the party is treated by the courts. but still those courts treat the party not as an indorser proper, but as an indorser sub modo.³ Certain other courts meet the difficulties of the anomalous contract well, by treating it as a contract but imperfectly expressed, or rather as expressed but in part; and accordingly, the contract being regarded as an open one, they receive evidence to show what, in point of fact, was the understanding of the parties in the execution of the particular engagement.⁴ But the party is treated, *prima facie*, as a maker.⁵

Another course, more commonly followed than either of the foregoing ones, proceeds to treat the contract in the way of an arbitrary presumption; the party being regarded as in the situation of a maker of the note.⁶ If he signed the paper when it

¹ Doubtless the same might be said of a bill of exchange, or perhaps of a cheque. *Jenkins v. Coomber*, 1898, 2 Q. B. 168, bill of exchange. But such cases are seldom if ever met with in this country.

² *Jenkins v. Coomber*, *supra*. See also *Steele v. McKinley*, 5 App. Cas. 754. That is, there is no custom of the kind.

³ *Coulter v. Richmond*, 59 N. Y. 478; *Hall v. Newcomb*, 7 Hill, 416; *Clouston v. Barbieri*, 4 Sneed, 336.

⁴ *Sylvester v. Downer*, 20 Vt. 355; *Cases*, 35. See *Eilbert v. Finkbeiner*, 68 Penn. St. 243; *Carr v. Rowland*, 14 Texas, 275; *Good v. Martin*, 95 U. S. 90; *Rey v. Simpson*, 22 How. 341.

⁵ *Sylvester v. Downer*, *supra*.

⁶ *Union Bank v. Willis*, 8 Met. 504; *Rodocanachi v. Buttrick*, 125 Mass. 134; *Phillips v. Cox*, 61 Ind. 345; *Herbage v. McEntee*, 40 Mich. 337; *Sem-*

was executed, he is a co-maker and joint maker with the real maker; if he signed at some later time, he is still a maker, though not a joint maker, — a maker by way of guarantor or surety.¹ In the first of the two cases his liability is supported by the same consideration which supports that of the real maker; in the second, it must be supported by a new consideration of its own.² Probably for some purposes the party would be treated as a surety even in the first case, where he is held to be joint maker; for it is to be remembered that a surety may be a joint maker with his principal. The courts which adopt this course admit evidence to show the time when the anomalous contract was signed, giving effect to the undertaking accordingly; but that is the extent to which they allow the contract to be effected by evidence.³

All this, however, supposes that the anomalous signing was for the further security of the payee, with liability to him.⁴ If that was not the case, if the signing was not intended to make the party liable to the payee, but to add security, with indorsement by the payee, to a purchaser of the paper, then the signing is not deemed anomalous at all, — it is indorsement proper, by the better doctrine, if the payee also has indorsed.⁵

ple *v.* Turner, 65 Mo. 696; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596.

¹ *Rodocanachi v. Buttrick*, supra; *Way v. Butterworth*, 108 Mass. 509; *Greenough v. Smead*, 3 Ohio St. 415; *Seymour v. Mickey*, 15 Ohio St. 515.

² *Tenney v. Prince*, 4 Pick. 385; *Green v. Shepherd*, 5 Allen, 589, 591; *Moses v. Lawrence Bank*, 149 U. S. 298; *Cases*, 221.

³ *Wright v. Morse*, 9 Gray, 337.

⁴ There is much real, and still more seeming conflict of authority in regard to cases of anomalous signature; but most of the cases, of which there is a multitude, will fall under one of the three classes of the text.

⁵ *Bigelow v. Colton*, 13 Gray, 309; *Clapp v. Rice*, id. 403; *Lewis v. Monahan*, 173 Mass. 122; *Bank v. Payne*, 111 Mo. 291; *Bank v. Nordgen*, 157 Ill. 663. But see *Sylvester v. Downer*, 20 Vt. 355; *Cases*, 35; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596; *McFetrich v. Woodrow*, 67 N. H. 174. 'Whether the maker of the note indorsed it before or after the indorsements of the defendant and the plaintiff were affixed was immaterial, if the maker indorsed the note before it was discounted. . . . The plaintiff and the defendant were not makers, but were indorsers of a note which was in effect a note payable to the bearer.' *Lewis v. Monahan*, supra; in which the plaintiff

The Statute provides that a person who places his name upon an instrument otherwise than as maker, drawer, or acceptor is an indorser, unless he clearly indicates his intention to be bound in some other capacity. And, further, ^{Under the Statute, a} that a person not otherwise a party to an instru- ^{quasi-indorser.} ment, by placing his name thereon in blank, before delivery, is liable as indorser, in accordance with certain rules (which will be stated when indorsement is reached).¹ It seems however that the non-statutory law still obtains, in so far as the Statute has not plainly repealed it.²

and defendant were successive parties by indorsement of a note, before delivery, for the maker's benefit. The maker, who was also payee, indorsed above their names, and before delivery.

¹ N. I. L. §§ 70, 71.

² See *Brooker v. Stackpole*, 168 Mass. 537, under legislation of 1874, and holding that, though the anomalous party was by that change in the law entitled to notice of dishonor, he remained 'in all other respects' a co-maker. See also *Rodocanachi v. Buttrick*, 125 Mass. 134.

CHAPTER V.

ACCEPTOR'S CONTRACT.

§ 1. ACCEPTANCE PROPER: NATURE AND INCIDENTS.

THE drawee, as such, of a bill of exchange¹ (or by the better rule of a cheque²) is under no liability whatever to the holder; Drawee not to the holder he has not bound himself in contract, liable. and he cannot be liable to the holder in tort upon refusal to honor the paper because as drawee he owes no duty to him. Until acceptance he owes no duty to any one, unless it be to the drawer; and to the drawer his duty is one of the common law only. The instrument is not an assignment of the money to the payee or other holder.³

Acceptance proper is the act by which the drawee of a bill of exchange, whether foreign or inland, signifies his assent to the order of the drawer, that is, his undertaking, What acceptance is: its effect. according to the law merchant, to pay the bill.⁴ Sometimes a cheque is said to have been 'accepted' by some significant act of the drawee; but the 'acceptance' will be found to be a different thing in legal effect from the acceptance of a bill of exchange. If written upon the

¹ N. I. L. § 134.

² Bank of Republic v. Millard, 10 Wall. 152; Fourth Street Bank v. Yardley, 165 U. S. 634; Akin v. Jones, 93 Tenn. 353; Cincinnati R. Co. v. Bank, 54 Ohio St. 60; Covert v. Rhodes, 48 Ohio St. 66; House v. Kountze, 17 Texas Civ. Ap. 402; N. I. L. § 193. Contra, Thomas v. Exchange Bank, 99 Iowa, 202; Gage Hotel Co. v. Union Bank, 171 Ill. 531.

³ N. I. L. § 134. This is true also, by the better rule, in regard to cheques. See note 2; N. I. L. § 196.

⁴ N. I. L. § 139. In the case of bills drawn in a set the acceptance may be written on any part and should be written on but one; otherwise the acceptor may be liable more than once, for the parts might fall into the hands of several holders in due course. N. I. L. § 188.

cheque, it will be certification; if not, it will at most be only an external promise to pay it. In neither case will it be of the same effect as acceptance proper of a bill of exchange, i. e. written acceptance upon the bill.

No one else than the drawee or his agent (except perhaps as surety or guarantor *with* the drawee) can assume the position and liability of acceptor. For example: A draws a bill on B, payable to the order of C. B writes his name across the face of the bill, or elsewhere upon it. B is an acceptor, bound absolutely to pay the bill. Again: A draws a bill on B, payable to the order of C. D writes the word 'Accepted' across the face of the bill, and signs his name thereto. D is not an acceptor of the bill.¹

By absolute acceptance, the drawee contracts much as the maker of a promissory note contracts; he binds himself to the holder absolutely to pay, according to the tenor of the bill. But the acceptor may annex a condition to his acceptance, when of course he will be bound according to the tenor of his acceptance.²

Acceptance proper binds the acceptor by the custom without regard to the question whether the bill was taken by the holder on the faith of the acceptance. The act is effectual though not done until after the holder became owner of the bill, and though he took it without any intimation on the part of the drawee of intention to accept it. Enough that the holder is a holder in due course, though there was no consideration between him and the acceptor, and though there was no consideration between the acceptor and the drawer, for the acceptance. For example: The plaintiff was payee of a foreign bill of exchange, which he took from the drawer on the day of its date, for value,

¹ Davis v. Clarke, 6 Q. B. 16; Cases, 45; May v. Kelly, 27 Ala. 497. There could be no protest and notice, such as would bind the drawer or indorsers on D's refusal to pay, for the drawer never requested him to pay.

If no drawee is named in a draft, the instrument may be treated either as a note (or it is said) as a bill. If it is treated as a bill, the drawer may be deemed drawee and acceptor. Funk v. Babbitt, 156 Ill. 408. Compare N. I. L. § 24, 5, of ambiguous instruments.

² N. I. L. § 69; Herter v. Goss & Edsall Co., 57 N. J. 42.

in regular course of business, before acceptance. The defendant accepted the bill without consideration from the drawer. The plaintiff is entitled to recover.¹

Besides undertaking to pay, the acceptor 'admits,' as a legal incident to his contract, the existence of the drawer, the Incidents of genuineness of the drawer's signature, and his acceptance. capacity and authority to draw the bill, and also the existence of the payee and his capacity at the time to indorse.² It will be necessary to consider this subject more fully in another chapter.³

Acceptance once given is irrevocable and conclusive, in the absence of fraud. It cannot be withdrawn on the ground of Cannot be mistake; for instance on the drawee's discovering revoked. that he was not indebted to the drawer.⁴ Even in case of fraud (unless 'in esse contractus')⁵ it could not be withdrawn against a holder in due course. And like the maker of a promissory note, the acceptor of a bill of exchange is bound to pay without any demand; unless his acceptance is so qualified in terms as to require demand as a condition to his liability.⁶

¹ *Foot v. Carter*, 152 Mass. 34; *Arpin v. Owens*, 140 Mass. 144; *American Bank v. Gluck*, 68 Minn. 129; *Heurtematte v. Morris*, 101 N. Y. 63; *Webster v. Howe*, 54 Conn. 394. 'It is immaterial when an acceptance is made; it may be made at any time, and the rights of the payee and of indorsees are the same after it is made whether they were acquired in anticipation of it or subsequent to it.' *Arpin v. Owens*, *supra*.

² N. I. L. § 69.

³ Chapter XVI, on Absolute Defences.

⁴ *Grumbach v. Hirsch*, 17 Texas Civ. Ap. 618; *Tile Co. v. Bank*, 23 Atl. Rep. 423; *Hoffman v. Bank*, 79 U. S. 181. The rule appears to be otherwise in regard to the certification of a cheque. *Irving Bank v. Wetherald*, 36 N. Y. 335. So held too of payment of cheques under mistake in regard to funds. *Merchants' Bank v. Eagle Bank*, 101 Mass. 281, 285. *Sed qu.* Compare *London Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7.

⁵ See p. 205.

⁶ *Steiner v. Jeffries*, 118 Ala. 573. Presentment for acceptance pertains only to the contract of the drawer or indorsers, and hence will be considered in another place.

Acceptance proper is signified by writing, upon the bill of exchange; in no other way can the order be fully satisfied, without the consent of the holder. In other words the order gives the holder, by the law merchant, the right to insist upon written acceptance upon the bill.¹ The Statute, which so declares, is only an affirmation of the law as it stood before. The result is, that the holder may treat the bill as dishonored if such acceptance is refused,² though acceptance in some other way is offered.

How signified:
writing may be
required: oral
acceptance.

Indeed no other kind of acceptance received by the holder of a *negotiable* bill would bar the right of later holders to require acceptance proper. Subsequent holders would have the same right to insist upon acceptance on the bill that the first holder had, unless limited by contract or assent in some other way. It has sometimes been laid down that acceptance may be oral as well as written; but that does not mean that oral acceptance has the same effect as acceptance written on the bill. Thus an oral acceptance of a bill of exchange may indeed be binding in favor of an indorsee of the person to whom it was given;³ but where that is true, it is because of the indorsee's right to elect to treat the oral promise as sufficient, and not because he was bound as indorsee to receive the oral acceptance in lieu of acceptance on the bill.

Acceptance on the bill may be signified before the drawer has signed the instrument, or while it is otherwise incomplete; also when the bill is overdue or even after it has been dishonored by a refusal to accept or by non-payment. If however a bill payable after sight should be dishonored by non-acceptance and afterwards accepted, the holder, unless there should be some other understanding, would

Acceptance
before bill is
completed:
overdue bill.

¹ N. I. L. § 140.

² Id.

³ Putnam Bank v. Snow, 172 Mass. 569: 'It is clear that, in the absence of any statute to the contrary, an oral acceptance of an existing bill of exchange is valid in this country, and that an indorsee of a bill so accepted may maintain an action on such acceptance against the acceptor.' Morton, J., citing several Massachusetts cases, and also Coolidge v. Payson, 2 Wheat. 66; Townsley v. Sumrall, 2 Peters, 170; Spaulding v. Andrews, 48 Penn. St. 411; Bissell v. Lewis, 4 Mich. 450; Nelson v. First National Bank, 48 Ill. 36.

be entitled to have the acceptance relate to the time of the first presentment to the drawee.¹

The drawee has, under the Statute, twenty-four hours' time after presentment for deciding whether he will accept; the acceptance however dating back, if given, to the day of the presentment.² All this probably applies to a second presentment, that is, after a refusal, as well as to the first.

If the drawee's agent accepts for the drawee, his acceptance should show that it is on behalf of the drawee and should purport in terms to bind him. External evidence would not be received to disclose the agency. For example: 'Office of Portage Lake Manufacturing Co., Hancock, Mich., June 5th, 1861.

'E. T. Loring, Agent, 39 State St., Boston.

At four months' sight pay to the order of J. H. Slawson, four hundred dollars, and charge the same to this company.

[Signed] 'I. R. JACKSON, Agt.,'

and accepted across the face, 'E. T. Loring, Agent,' binds Loring personally, and evidence of his agency will not be received.³

Apart from statute written acceptance may be made in any way and anywhere, if upon the bill or upon a paper annexed, so long as there is an intention to accept. There are in use, however, certain brief modes of acceptance by which, because they conform to recognized custom, the law understands the intention directly, as much so as if the drawee were to write out in full and sign his undertaking to pay the bill at maturity. In these cases the intention to accept is fixed by the particular act; no different intention can be shown, unless, indeed, by fraud and mistake, or perhaps by mis-

¹ N. I. L. § 145.

² Id. § 143.

³ *Slawson v. Loring*, 5 Allen, 340. 'Being negotiable paper, all evidence dehors the draft is to be excluded. It is wholly immaterial therefore that the defendant was in fact the agent of the company named on the face of the draft, that the plaintiff knew that he was so, and that the defendant had no personal interest in the company.'

take without fraud, the alleged acceptor was led to signing one instrument when he supposed he was signing another.¹ The customary modes of acceptance thus recognized by law are the following: Writing the word 'accepted,' or writing the name of the drawee, or any substitute for his name, upon the face of the bill; either of these alone, written by the drawee or by his agent, has a fixed meaning in law, to wit, acceptance.²

There are other modes of writing on the bill, by the drawee, which, though they have not the force of recognized custom, but still apparently signify acceptance, are deemed presumptively to be a manifestation of intention to accept; that is, they are deemed *prima facie* acceptance. The commonest of these are the following: Writing upon the bill 'presented,' or 'seen,' or the day of the month; these or any other words written by the drawee, which are consistent with the idea of acceptance, are held to amount to acceptance unless they are shown to have been written with a different intention.³

The Statute however, like previous legislation in some of the States, requires the *signature* of the drawee.⁴

§ 2. KINDS OF ACCEPTANCE (PROPER).

Acceptance on the bill may be general or qualified. General acceptance is an assent to the order without qualification;⁵ as for instance by the mere signature of the drawee, or adding to the signature a particular place of payment, if such place be not designated as the only place of payment.⁶ A qualified acceptance varies, in

General acceptance: qualified acceptance.

¹ Compare *Foster v. Mackinnon*, L. R. 4 C. P. 704; indorsement procured by fraud as to the instrument. Such cases must be distinguished from fraudulent representations in regard to the consideration.

² See *Spear v. Pratt*, 2 Hill, 582.

³ See *Spear v. Pratt*, *supra*. It has been held that a signature of the drawee following the words, 'Paid on this order forty dollars,' amounts to an acceptance of the whole. *Peterson v. Hubbard*, 28 Mich. 197. But see *Cook v. Baldwin*, 120 Mass. 317; *Bassett v. Haines*, 9 Cal. 261.

⁴ N. I. L. § 139: 'The acceptance must be in writing and signed by the drawee.' The drawee's signature alone would satisfy the Statute. *Spear v. Pratt*, *supra*.

⁵ N. I. L. § 146.

⁶ *Id.* § 147.

terms, the effect of the order; as for instance by designating a particular place of payment as the only place of payment,¹ or by making payment otherwise conditional,² or by restricting the sum payable,³ or the time of payment,⁴ or by being the act of but one or more of the drawees when there are two or more drawees.⁵ The Statute mentions no other instance of qualified acceptance; whether the enumeration is intended to be complete, so as to exclude all else, may however be doubted. If the holder may elect to receive any of the designated kinds of qualified acceptance, it is not unreasonable to suppose that he may receive others.

It should be noticed, as has been intimated already, that the holder is not bound to receive a qualified acceptance; he may insist upon acceptance according to the order, that is, general acceptance, and if the drawee refuses to treat the bill as dishonored.⁶ It should also be noticed that as a qualified acceptance is not a compliance with the order, the drawer and any indorsers of the bill at the time, not having assented, are no parties to the qualified undertaking; and the order itself having failed, they are discharged.⁷ Still if they authorized the qualified acceptance, or if they afterwards assented to it, they will be bound accordingly, that is, according to the qualified acceptance.⁸

The drawer and indorsers are deemed to assent to a qualified acceptance, if, having received notice from the holder that such an acceptance has been received, they do not express their dissent within a reasonable time.⁹ All parties subsequent to the qualified acceptance assent, of course, to it. The qualities of the instrument are not affected by the qualified acceptance otherwise than as has been indicated; and what has been said applies both to the unwritten law merchant and to the Statute.

¹ N. I. L. §§ 147, 148, 3.

⁴ Id. 4.

⁷ Id.

² Id. § 148, 1.

⁵ Id. 5.

⁸ Id.

³ Id. 2.

⁶ Id. § 149.

⁹ Id.

§ 3. QUASI-ACCEPTANCE.

Resides acceptance proper, as above described, various acts are called acceptance with some qualifying word; none of them having the effect of acceptance proper. Such acts Enumeration of cases. may be called quasi-acceptance. The following is an enumeration of the same: Written acceptance on a separate paper not attached; oral acceptance; acceptance by conduct; acceptance for honor; promise to accept or 'virtual acceptance' so-called. These in order.

First then of written acceptance not on or attached to the bill. By this is meant what, if written on the bill, would be either an absolute or a qualified acceptance, according to its terms; that is to say, it is either an Written acceptance on separate instrument. absolute or a qualified promise to pay the sum named in the bill, as distinguished from a promise to accept the same at some future time. The bill should be identified either in the acceptance or in the correspondence or negotiations relating to it, or at least be capable of identification by external evidence.

That such an acceptance differs essentially in legal effect from acceptance is clear. The Statute, following no doubt unwritten law merchant so far as there is any on the subject, declares that acceptance written elsewhere than upon the bill itself binds the acceptor only in favor of a person to whom the acceptance is shown, and then only in case he takes the bill for value on the faith of the acceptance.¹ The act no doubt admits, as an incident, the authority and capacity of the drawer to draw the bill, in the absence of fraud, and also the genuineness of the drawer's signature when the acceptance is given after seeing the bill. Perhaps the acceptance also admits the capacity of the payee to indorse. The Statute is silent on these points.

Probably acceptance by telegraph would be acceptance within the meaning of the law.² Telegraph.

¹ N. I. L. § 141. Qu. whether there must also be a promise to such taker of the bill, where he is not the person to whom the acceptance is first given? Perhaps not.

² See *Henrietta Bank v. State Bank*, 80 Texas, 648; *Cases*, 56; *North*

Secondly, of oral acceptance. Some remarks have already been made on this kind of acceptance, in speaking of acceptance proper; the effect of which was, that oral acceptance does not comply with the order except at the election of the holder. Any holder may, it seems, elect to have the benefit of it, even though not the one to whom the acceptance was immediately given.¹

Much of what has been said concerning acceptance on a separate sheet applies to oral acceptance. The acceptance may be absolute or qualified; the bill should be identified by the acceptance or capable of identification; and the incidents of the contract are probably the same as in the acceptance just mentioned.

Oral acceptance then is not necessarily open to the objection that it is obnoxious to the provision of the Statute of Frauds which requires promises to answer for the debt or default of another person to be in writing. In accepting the acceptor ordinarily promises to pay a debt of his own, due the drawer of the bill, to another person, the payee or other holder of the bill. The Statute of Frauds does not affect an oral consent by the debtor to a request of the creditor to pay the debt to another. But it may be that the oral acceptor did not owe the drawer any debt, and was under no duty at all to him to accept the bill; if then the drawer owed the payee or other holder a debt or duty to be discharged by the bill, the oral acceptance might be within the Statute of Frauds.²

According to older authority, still maintained to a considerable extent, the oral undertaking in the case just put would not be within the Statute of Frauds if credit was given to the oral

Atchison Bank v. Garretson, 51 Fed. Rep. 167, 'acceptance' of a cheque by telegraph.

¹ *Putnam Bank v. Snow*, 172 Mass. 569, 575-576; ante, p. 53. This case was a suit upon a promise to accept, not upon a direct oral acceptance; but the language is fortified by many cases cited.

² See *Walton v. Mandeville*, 41 Am. Rep. 123; *Manley v. Geagan*, 105 Mass. 445; *Pierce v. Kittredge*, 115 Mass. 374. If the drawer did not owe the payee or holder, and the acceptor did not owe the drawer, the whole transaction, so far, would fall to the ground for want of consideration.

acceptor, by the payee or holder, at the time and as part of the transaction connected with the acceptance. According to that view, the acceptor incurs a debt of his own in the credit given by the payee or holder; and the acceptance therefore is only the acceptor's promise to pay his own debt. That view however has well been considered unsatisfactory.

The credit so given is not a 'debt or default' in the natural sense; and as there is nothing in the language of the Statute of Frauds to indicate that those words are not to be taken in their natural or primary sense, they should be taken in that sense. A 'debt' due by A to B imports, in the natural sense of the word, some benefit which A has obtained from B, and 'default' of A towards B some harm which A has caused to B. 'Credit' given by B to A, in respect of a transaction in which A has no interest or concern, except as his promise to pay creates it, does not fit the case. The authorities too appear to be inconsistent with themselves. For it seems to be agreed that if the oral promise was *subsequent* to the transaction in which the drawer became indebted or bound to the payee or holder, the true question is, Did the oral acceptor make his promise by reason of value received by *him*? That is, did any consideration move from the payee to the acceptor, to the *latter's* benefit? If the answer is in the negative, the acceptance is within the Statute of Frauds, and is not binding.¹ Now if the test in this latter case is one of benefit to the acceptor, according to the natural meaning of the language of the Statute, it is hard to see why the same is not true where the transaction between the drawer and the payee or holder was contemporaneous with the acceptance, the acceptance being the inducement to the transaction.² The language of the Statute is general, and should be taken in the same sense in all cases. The first of the views above mentioned confounds consideration with debt; the giving of credit makes consideration but not debt.³

¹ See *Nelson v. Boynton*, 3 Met. 396; *Curtis v. Brown*, 5 Cush. 488.

² See *Sutton v. Grey*, 1894, 1 Q. B. 285; *Manley v. Geagan*, 105 Mass 445. And upon the whole subject see the very clear exposition of it in *Harri-man*, Contracts, 196-199.

³ It should be particularly noticed that the Statute of Frauds is not satis-

Thirdly, of acceptance by conduct. This too, it should first be noticed, is in effect oral acceptance, and therefore is or is not obnoxious to the Statute of Frauds in accordance with what has been said. But there are special features of acceptance by conduct, which justify giving it a separate designation.

Such acceptance might no doubt be given in different ways; but there appear to be but two or three recognized examples. One of them is by 'giving credit to the bill.' As we have already seen, the drawee has twenty-four hours for deciding whether he will accept or not; if he should retain the bill longer, he will be deemed to have accepted it, unless he was under no duty to return it or give answer to the order. Keeping it, when the drawee is under no duty to return it, does not give 'credit' to the bill, that is to say, it does not plainly lead the owner of it to suppose that it has been accepted.¹ But presumptively, it seems, for the drawee to retain the bill for more than twenty-four hours, knowing that it has been presented to him for acceptance, will amount to acceptance by conduct.² The presumption could be overturned however not only by showing that the drawee was under no duty to return it, but that it was impracticable to return it within the time; in which latter case there would be no acceptance unless the bill was retained after it became practicable to return it.

Another example, and the only other one given in the Statute, is the destruction of the bill by the drawee.³ This too, no doubt, would be no more than presumptive acceptance, and capable of explanation in another sense. Thus the drawee might show that the act was one of mistake without fault on

fied with the existence of a consideration to support the defendant's promise; there must also be a written promise.

¹ *Dunavan v. Flynn*, 118 Mass. 537.

² N. I. L. § 144. The Statute uses the word 'refuses' by the drawee within the time; but it seems that he 'refuses,' if he does not comply. Notice of dishonor could doubtless be given for *failure* to accept.

³ *Id.* 'Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.'

his part, or that it was done at the request of the owner or of his agent.

This kind of acceptance operates only between the immediate parties, unless the bill has actually come again into the possession of the owner. Obviously if it remains in the hands of the drawee,¹ or if it has been destroyed by him and no copy of it made, no right of action upon it could be acquired by an indorsee. There could not be an indorsee of an instrument not delivered to him.

The contract will ordinarily be absolute, and the incidents the same, it seems, with those of the acceptances already described.

Nature and incidents of contract.

Fourthly, of acceptance for honor. Such acceptance is also called acceptance *supra protest*, as it always follows protest, if received at all. It is not in use in this country, to the extent of custom; but the Statute provides for it as if it were, adopting the law of England, where the law is only an expression of actual custom.² It may be received either after protest for non-acceptance or 'for better security'; but the holder is not bound to receive it in either form.³ Receiving it has no effect upon the liability of the other parties to the bill.

Acceptance for honor.

Acceptance for honor must be in writing, must indicate that it is for honor, and must be signed by the person so accepting.⁴ It may be for the honor of any or of all the parties to the bill, and may state for whose honor it is given; if it should not, it will be deemed to be for the honor of the drawer.⁵ The acceptance may be for but part of the sum named in the bill, and one person may accept for the honor of one person and another for that of another.⁶ According to the Statute, any person not a party liable on the bill may, with the holder's consent, intervene and accept *supra protest*.⁷ This, in

For whom: by whom.

¹ As in *Dunavan v. Flynn*, 118 Mass. 537.

² N. I. L. Art. xiv.

³ That protest for better security is not necessary, see *In re English Bank*, 1893, 2 Ch. 438. Such protest, not being for dishonor, cannot be followed by notice with any legal effect.

⁴ N. I. L. § 169.

⁵ Id. § 170.

⁶ Id.

⁷ Id. § 168.

terms, would permit such acceptance by the drawee himself after refusing acceptance according to the order. But according to the unwritten law merchant of this country, the drawee cannot so accept if he was under legal duty to the drawer to honor the bill by acceptance.¹

Acceptance for honor on non-acceptance explains itself, after what has been said. It sometimes happens that the bill contains 'In case of need,' a reference by the drawer to a person named, to whom the holder is requested to present the bill for acceptance 'in case of need,' that is, upon the drawee's refusal to accept. But the request does not bind the holder; ² he may, if he will, after causing the bill to be protested for non-acceptance, proceed as if no such reference were given and give notice of dishonor to the drawer and indorsers. The person to whom the bill thus refers the holder is called the 'referee in case of need.' ³

Acceptance for honor in the way of 'better security' follows, if received, an actual acceptance. Where, after acceptance, the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of his creditors, before the maturity of the bill, the holder may cause the bill to be protested for better security against the drawer and indorsers,⁴ and may then, it seems, receive an acceptance for honor as in other cases.

The contract of the acceptor for honor is an undertaking to pay on two conditions; the first of which is, that a further presentment of the bill to the drawee for payment shall be made at maturity, and that if then dishonored it shall be protested again and due notice of the dishonor given to such acceptor. For example (hypothetical): A draws a bill on B, payable to the order of C. C presents the bill to B for acceptance, and B refuses, whereupon C has it protested for non-

¹ *Schilmelpennich v. Bayard*, 1 Peters, 264; *Konig v. Bayard*, id. 250.

² N. I. L. § 138.

³ Id. The reference may relate to non-payment as well as to non-acceptance. Id. Payment by such party in such case would be payment for honor. See id. Art. xv.

⁴ Id. § 165.

acceptance. D then accepts the bill, with C's consent, for the honor of A. At maturity C presents the bill to B for payment, who again dishonors it. C takes no further step, or if he causes the bill to be protested, he does not notify D of the dishonor. D is not liable.

The second condition is, that presentment for payment (after performance of the first condition) if to be made to the acceptor for honor in the place where the protest for non-payment was made, must not be later than the day following the maturity of the bill.¹ If to be made in some other place, the bill must be sent forward within the time prescribed for giving notice of dishonor to an indorser residing in a different place from that of the person giving the notice.² And there is a corresponding provision for cases of excusable delay.³

The acceptor for honor, upon payment of the bill and expenses, according to the law, becomes, it may properly be added, a purchaser and entitled to possession of the bill and the protest; ^{Effect of payment by acceptor for honor.} succeeding by subrogation to the rights and the duties of the last holder as regards the party (or parties) for whose honor he pays and all parties liable to the latter. All parties subsequent to the party for whose honor the payment is made are discharged by such payment.⁵

Fifthly, of promise to accept, or 'virtual' acceptance. By this is meant an undertaking by the drawee of a bill of exchange to do at some future time what a bill requires of the drawee on presentment of the same for acceptance. ^{Promise to accept, or 'virtual' acceptance.} The promise may be made before the bill is drawn,⁶ or afterwards.⁷ It will ordinarily be a promise to accept the

¹ This fact shows that such second presentment for payment is made to fix the liability of the acceptor for honor, since if made on the day after maturity it would be of no avail for fixing the liability of the drawer or indorsers. Their contract, as will be seen hereafter, requires presentment for payment on the day of maturity.

² N. I. L. § 175; also § 110.

³ Id. § 176. These will be stated under the Indorser's Contract.

⁴ N. I. L. § 184.

⁵ Id. § 182.

⁶ Putnam Bank v. Snow, 172 Mass. 569; N. I. L. § 142.

⁷ Central Bank v. Richards, 109 Mass. 413.

bill when presented for the purpose; but the promise to accept may be made at the very time when the bill is presented for acceptance; at the election of the holder to receive a promise to do at a future time what the order requires presently.¹ In this case however the holder acts at his peril towards the drawer and indorsers (if any) of the time, unless they authorize or consent to the proceeding; for otherwise the bill is dishonored and the usual steps on dishonor must be taken to fix the liability of secondary parties. The promise too may be absolute or qualified, as in the case of acceptance proper. The promise may be in writing, as by telegram,² or, in the absence of statute, oral; if in writing the promise need not be and probably never is written upon the bill. The promise should clearly identify the bill.³

In regard to the nature of this contract, as the bill of exchange does not contemplate anything short of acceptance on the part of the drawee, the promise to accept is no affair of the law merchant. It belongs to contracts of the common law, modified somewhat however by its connection with an instrument of the law merchant. It is accordingly subject to the limitations of the common law; it does not import consideration; it has not the property of general negotiability or of days of grace.

The nature of this 'virtual' acceptance has indeed been somewhat obscured at times, partly by the term '*virtual* acceptance,' partly because the act relates to a contract of the law merchant. But it is clear upon the better authorities, as well as upon principle, that it has not the properties of a contract of that law. For example: A in Boston draws a bill of exchange on B in New York, payable to the order of C, and informs B by letter that he has drawn the bill. B replies by letter to A, saying, 'Your draft will be duly accepted.' D discounts and becomes holder of the bill, on C's indorsement. D cannot maintain an action against B, because the contract of B, if any

¹ The distinction should be sharply noticed between a promise to accept and a promise to pay. The latter is, or may be, acceptance proper.

² *Central Bank v. Richards*, 109 Mass. 413.

³ *Coolidge v. Payson*, 2 Wheat. 66.

was created, was not negotiable or transferrible.¹ For the same reason C could not maintain an action against B.

That the contract of the 'virtual' acceptor is not acceptance proper in any case is shown by the fact that the holder, that is, any holder, may insist upon acceptance proper notwithstanding the virtual acceptance, or rather in accordance with it since it is a promise to accept, and may cause the bill to be protested for dishonor if acceptance proper is refused. It differs from true acceptance also in that it is available only in favor of him to whom it was made or one who has taken the bill in reliance upon the promise to accept.² Virtual acceptance is in fact and in law a separate, independent engagement; the bill of exchange may circulate freely, and be presented for payment at maturity, without reference to its existence.

It will be right to infer that the promise to accept is not necessarily binding in favor of the holder because it is supported by a valuable consideration, for the holder may not have connected himself with the promise by taking the bill in reliance upon the promise. For example: For valuable consideration the drawee of a bill promises the payee to accept it, if

¹ Worcester Bank v. Wells, 8 Met. 107; Exchange Bank v. Rice, 107 Mass. 37; s. c. 98 Mass. 288. See Henrietta Bank v. State Bank, 80 Texas, 648, 651; Grant v. Hunt, 1 C. B. 44.

² Coolidge v. Payson, 2 Wheat. 16; Putnam Bank v. Snow, 172 Mass. 569; Central Bank v. Richards, 109 Mass. 413; Exchange Bank v. Rice, 107 Mass. 37; s. c. 98 Mass. 288; N. I. L. § 142. See Henrietta Bank v. State Bank, 80 Texas, 648; Cases, 56. Some courts have held that a promise to accept an *existing* bill may be sued upon by the holder whether he took the bill on the credit of the promise or not. Jones v. Bank of Iowa, 34 Ill. 313; Read v. Marsh, 5 Mon. 8. But the doctrine is unsound. The Statute provides that an unconditional promise in writing to accept a bill *before* it is drawn is deemed an *actual* acceptance in favor of every person who, upon the faith thereof, receives the bill for value. N. I. L. § 142. But that is not to be taken as meaning that such acceptance takes the place of acceptance proper. The Statute in the same connection declares that the holder may require acceptance on the bill, § 140. But any holder may no doubt *elect* to treat the promise of the Statute as performance, i. e. as acceptance proper, and thus sue upon the bill, rather than upon the promise to accept. If however the bill should not be drawn, no suit could be brought as upon an accepted bill. Allen v. Leavens, 26 Oregon, 164.

presented on a certain day. The payee now indorses the bill to the plaintiff, who takes it without knowledge of the promise. Afterwards, being informed of the promise, the plaintiff presents the bill to the drawee, on the day named in the promise, for acceptance, which is refused. Payment is also refused at maturity of the bill. The drawee is not liable to the plaintiff.¹

It appears however to be unnecessary for the virtual acceptor to make a promise to the holder when once he has given his promise to accept to a prior party.²

The incidents of this contract are probably the same as those of the contracts preceding in this section; though of course the virtual acceptor does not admit the genuineness of the contract. the drawer's signature unless he saw the signature before promising to accept.

¹ *Coolidge v. Payson*, 2 Wheat. 66; *McEvers v. Mason*, 10 Johns. 207; *Exchange Bank v. Rice*, 98 Mass. 288; s. c. 107 Mass. 37; *Worcester Bank v. Wells*, 8 Met. 107.

² *Central Bank v. Richards*, 109 Mass. 413, promise by telegram to accept a bill, made to the drawers and next day shown to the plaintiff, which thereupon discounted the bill, held binding.

CHAPTER VI.

CERTIFIER'S CONTRACT.

THE drawee of a cheque sometimes writes upon it the word 'good,' 'accepted,' or the like, on request of the drawer, or of the payee or other holder. This is done with a view to using the cheque, out of ordinary course, as a means of credit, as for instance with a view to passing it to another who under the circumstances cannot present it for payment at once, or does not desire to do so.¹ The act is called certification of the cheque.²

Certifying a cheque: its object.

Certification is not in terms or by implication called for by the cheque itself, and is therefore purely a voluntary act on the part of the drawee, in the absence of any special undertaking to certify. The result is that refusal to certify can have no legal consequences; no notice of dishonor can be given for such refusal, since to refuse to certify is not to refuse what the cheque requires, to wit, payment. Refusal to certify a cheque is a very different thing from refusal to accept a bill of exchange, as will be seen.

A voluntary act: refusal to certify.

On the other hand, granting the request to certify the cheque is a very different thing from granting the order to accept a bill. Sometimes done by the use of the word 'accepted,' and even in the Statute loosely spoken of as 'equivalent to an acceptance,'³ it is only 'acceptance' of a cheque, a term to be avoided. It is only 'acceptance' or 'an equivalent' in the sense that it is a promise to pay the cheque.

Differs from accepting a bill.

¹ *Minot v. Russ*, 156 Mass. 458, is one of many illustrations.

² Sometimes promissory notes payable at bank are certified by the bank, probably with much the same effect, except as to time of payment of notes payable at a future day named.

³ N. I. L. § 191.

It has been held that the teller of a bank has no authority in virtue of his office to certify cheques drawn upon his bank; that being a power to pledge the credit of the bank, which should not rest by law with an inferior officer.¹ The contrary would be true of the president, vice-president, or cashier.² It is however usual in cities to confer power upon some officer of the bank, generally the cashier, it may be the teller, to certify the cheques of customers of the bank, in so far as they have funds on deposit. And of such cases it is held that certification binds the bank, in favor of an innocent holder for value, though in point of fact the drawer had at the time no funds in the bank. It matters not whether the certification in such a case was due to mistake of the bank officer or not.³ The certification means, not that the drawer has funds at the time of the certification, and will continue to have them when payment is demanded, but that the bank will pay the sum to the holder on demand.⁴

In regard to the nature of the undertaking, certification is an absolute promise to pay the sum named in the cheque, on demand, in the absence of other terms. The promise is at maturity from delivery of the certified instrument, until the lapse of a reasonable time, when it becomes overdue. Payment may be demanded any time before the Statute of Limitations bars an action, so far as the liability of the certifier is concerned, unless the time of payment is specified in the certification, an unusual thing; though parties secondarily liable (if any consented to certification) are entitled to have demand for payment made on the certifier before the expiration of a reasonable time from the certification. The certifier's contract is negotiable or not, according to the tenor of the cheque. The contract is one of custom.

¹ *Mussey v. Eagle Bank*, 9 Met. 306. But see *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125.

² *Merchants' Bank v. State Bank*, 10 Wall. 604.

³ *Farmers' Bank v. Butchers' Bank*, and *Merchants' Bank v. State Bank*, *supra*.

⁴ *Mussey v. Eagle Bank*, 9 Met. 306.

The incidents of the contract of certification appear to be the same in many respects as those of accepting a bill of exchange, but not in all. The acceptor of a bill cannot say that the drawer had no funds in the acceptor's hands, and that the acceptance was given in mistake;¹ while the drawee of a cheque which he has certified may, it seems, withdraw his certification, on discovering that it was given in mistake on the point of funds, unless meantime there has been a change of position by the holder.²

Incidents differ from those of acceptance.

Again, certification, unlike acceptance of a bill, not being a compliance with the order of the instrument, it results that if the drawer did not procure or authorize or has not assented to the act there is no contract with him, and of course none with other secondary parties who have not authorized or assented to it. And he and they are discharged of all liability.³ If however the drawer procured, authorized, or assented to the certification, he cannot afterwards object or claim that his order has not been complied with; and so of other assenting parties.⁴

Certification carries with it no doubt the usual presumption of consideration, but not grace because payment is due on demand.

¹ Ante, p. 52.

² *Irving Bank v. Wetherald*, 36 N. Y. 335. Sed qu. why there should be less duty on the part of the drawee to know the state of the drawer's funds than the genuineness of his signature? Payment on mistake as to funds is put on the same footing as certification under the like mistake. *Merchants' Bank v. Eagle Bank*, 107 Mass. 281, 285.

³ *Minot v. Russ*, 156 Mass. 458; *First National Bank v. Whitman*, 94 U. S. 343, 345; *First National Bank v. Leach*, 52 N. Y. 350; *Born v. First National Bank*, 123 Ind. 78; *National Bank v. Miller*, 77 Ala. 168; N. I. L. § 195.

⁴ *Minot v. Russ*, supra; *Bickford v. First National Bank*, 42 Ill. 238; *Rounds v. Smith*, id. 245; *Andrews v. German Bank*, 9 Heisk. 211. The reasons given by the courts vary, and are not always satisfactory.

CHAPTER VII.

DRAWER'S CONTRACT.

§ 1. DRAWER: MAKER: INDORSER.

FIRST, of the drawer of a bill of exchange. The contract of the drawer of a bill of exchange must be set in strong contrast to that of the maker of a promissory note; in no way are the two alike. The contract of the drawer, whether of a bill or of a cheque, is unlike that of the maker in form, in that it does not appear upon the face of the writing; it is unlike the contract of the maker in effect, in that the contract of the drawer of a bill is conditional and secondary.

Peculiarity of drawer's contract: like indorser's in most respects.

The contract of the drawer of a bill of exchange is in the main like that of an indorser. The drawer stands in the position of first indorser, in order of liability; thus the order of liability of parties to an accepted bill is this: (1) acceptor; (2) drawer, virtually as first indorser; (3) payee, virtually as second indorser though literally first, or such indorser, if any, as follows negotiation; and then, (4) any subsequent indorsers in order. If the bill is not accepted, the order of parties begins with the drawer, still virtually as first indorser, and then proceeds as in the case of an accepted bill. It will be sufficient here to state the general nature of the drawer's contract, and then refer the reader to the chapter on the Indorser's Contract for details; for these, so far as the drawer's contract agrees with the indorser's, may better be considered there, once for all. The drawer, by drawing the bill, engages that on due presentment the bill shall be accepted or paid, or both, according to its tenor, and that if it be dishonored and the proper proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any

subsequent indorser who may be compelled to pay it. But the drawer may insert in the bill a stipulation negating or limiting his liability.¹ He admits, as an incident to drawing the bill, the existence of the payee and his capacity at the time to indorse.²

§ 2. RIGHT TO DRAW: REASONABLE GROUND.

Looking a little deeper, there are, between the contract of drawer and that of indorser, several substantial legal differences arising from the very nature of things. A man who draws a bill of exchange is naturally and legally supposed to have something to draw upon in the hands of the drawee, or at all events he is supposed to have a reasonable expectation that the draft will be accepted and paid by the drawee; that is, the drawer is supposed to stand in close relation to the drawee, and to have good ground accordingly for drawing.³ An indorser however is not ordinarily supposed to know,⁴ and, in fact, generally does not know, anything about the state of things between the drawer and the drawee; and though his indorsement is, by a useful fiction, treated as equivalent in many respects to drawing a bill, and when special, as where the indorsement itself is to 'order,' is also in form like a bill in brief, still it is not a drawing by one having or supposed to have funds with the drawee, or knowledge of the action to be taken by him; that is, the indorser as such is not supposed to stand in any special relation to the drawee.

Differs from indorser's contract in certain respects: want of funds; notice of dishonor.

It results from this difference of situation, that the drawing of a bill of exchange (and the same is true of a cheque) may operate as a fraud; and a drawing which may operate

¹ N. I. L. § 68.

² Id. As to a drawer of a cheque see *infra*, § 3.

³ See N. I. L. § 86.

⁴ It will be otherwise where the instrument was made, drawn, or accepted for the indorser's accommodation. See N. I. L. § 87. So one who indorses for accommodation of the drawer of a bill, both knowing that there is no reasonable ground to draw, participates in the (virtual) fraud, and hence is not entitled to notice of dishonor. *Farmers' Bank v. Van Meter*, 4 Rand. 553.

as a fraud should and does put the drawer in a different position from that of an honest drawer, and different therefore from that of an indorser. The drawer in such a case, upon dishonor of the paper, if not by the very act of drawing, is in like position with the maker of a promissory note; he is not entitled to notice of dishonor at any rate.¹ For example: A draws a bill of exchange on B, payable to the order of C, having no reasonable ground to believe that the bill will be honored by B; and it is not honored by him. A is liable to C without notice of the dishonor.²

But one is not lightly to be deemed guilty of fraud; and it does not necessarily make one guilty of fraud to draw without having provided and left with the drawee funds with which to pay one's draft, for one may still have reasonable ground to expect that the draft will be honored. Reasonable ground for drawing is the test.³ The exact state of accounts between the drawer and the drawee may not be known by the drawer at the time of drawing; the accounts may be fluctuating from time to time, and balanced only at considerable intervals; and the drawer may reasonably suppose that the balance is in his favor to the amount of the draft; or though he may know that the balance is against him, he may have had assurance from the drawee that the paper will be honored; or he may have felt reasonably justified in drawing from practice between himself and the drawee in such cases. Drawing is not a fraud under circumstances of the kind.⁴

¹ N. I. L. § 121, 4.

² *Hopkirk v. Page*, 2 Brock. 20; *Robinson v. Ames*, 20 Johns. 146; *Orear v. McDonald*, 9 Gill, 350; *Wood v. Price*, 46 Ill. 435; *Harness v. Davies Sav. Assoc.*, 46 Mo. 356; *Dickens v. Beal*, 10 Peters, 577; *Brown v. Maffey*, 15 East, 216; *Rucker v. Hiller*, 16 East, 43. It seems that the drawer would be liable without any demand upon the drawee; for why demand payment of a bill unreasonably drawn?

³ See the cases just cited, to which many others might be added. A few early cases, following the discredited decision in *Bikerdike v. Bollman*, 1 T. R. 405, are contra. See *Foard v. Womack*, 2 Ala. 368; *Tarver v. Nance*, 5 Ala. 712; and certain New York cases, in which, however, the point was not raised. The true rule in New York conforms with the text. *Robinson v. Ames*, 20 Johns. 146.

⁴ See *Dickens v. Beal*, 10 Peters, 572; *Hopkirk v. Page*, 2 Brock. 20.

The holder, however, makes a case, it seems, against the drawer, by showing that he had no funds in the hands of the drawee when the bill or cheque was presented; it is then for the drawer to show, if he can, that, notwithstanding the want of funds, he had reasonable ground to believe that the paper would be honored, and hence that the usual steps for fixing the liability of a drawer should have been taken.¹

The 'reasonable ground' of the rule may relate either to the time of the drawing of the instrument, or to the time of presentment. Hence, the drawer may fall without the ^{Time of reason-}protection of the rule even where he had funds ap- ^{able ground.}plicable to the draft at first, or on the way, to meet it, for he may withdraw or intercept them, and then have no reasonable ground to expect that the paper will be honored.² On the other hand if the drawer has funds when the bill is presented for payment, he is entitled to notice, though he may not have had funds when he drew the bill or reason, then, to expect that the bill would be honored.³

In regard to what amounts to reasonable ground, it is laid down that there must be something more than that which would excite an idle hope or a bare expectation, — something more than a remote probability. There must be a prospect such as would create a full, sober expectation or strong probability that the paper will be honored; such a state of things as would induce a merchant of common prudence and fair regard for his commercial credit to draw the draft.⁴ The fact that the drawee is indebted to the drawer would create, presumptively, a case of the kind, though in point of fact the drawer have no funds in the drawee's hands.⁵ The case would probably be different if the existence of the debt were in dispute. For example: A draws a bill of exchange on B, for an amount which A expects to recover against B in a contested

¹ *Harness v. Davies Sav. Assoc.*, 46 Mo. 357 ; *Story, Bills*, § 312.

² *N. I. L.* § 121, 5: 'Where the drawer has countermanded payment.'

³ See *Gage Hotel Co. v. Union Bank*, 171 Ill. 531.

⁴ See cases in note 2, p. 72.

⁵ *Walker v. Rogers*, 40 Ill. 278.

suit by A against B. A has drawn without funds or reasonable ground to draw.¹

The drawer may have reasonable ground to draw in certain cases, before any debt exists, by having an indisputable expectation of one, as where, having made a consignment to another, he draws before the consignment has reached the consignee.² Nor does it affect the case that the consignment, by depreciation of value, may have become insufficient to meet the bill, for that was not to be foreseen;³ if it *was* foreseen by the drawer, or was understood by him to be inevitable, the case would probably be different. Again, it makes no difference, and for the same reason, that the consignment may never have reached the consignee.⁴ So again the drawer has reasonable ground, where a debtor of his requests him to draw on a certain person, who is represented by the debtor to be indebted to him, especially where the drawee accepts (afterwards refusing to pay).⁵ But the drawer of a bill who has no funds with the drawee, except that he has supplied him with goods on credit, which credit does not expire till long after the bill becomes due, has no reasonable ground to draw.⁶

The fact that the bill may have been accepted by the drawee has, by the weight of authority, no *decisive* bearing upon the question of the right of the drawer to draw.⁷ Acceptance may perhaps require the holder to await the maturity of the bill, and then present it again for payment,

¹ *Benoist v. Creditors*, 18 La. 522; *Williams v. Brashear*, 19 La. 370. The second of these cases shows that the test of absence of funds is not conclusive; only the absence of reasonable ground is conclusive.

² *Dickins v. Beal*, 10 Peters, 572; *Orear v. McDonald*, 9 Gill, 350; *Grosvenor v. Stone*, 8 Pick. 79.

³ *Robinson v. Ames*, 20 Johns. 146. See *Rucker v. Hiller*, 16 East, 43.

⁴ Byles, Bills, 301, 13th Eng. ed.

⁵ Byles, *ut supra*, citing *Lafitte v. Slatter*, 6 Bing. 623.

⁶ *Id.*, citing *Claridge v. Dalton*, 4 Maule & S. 226.

⁷ See *Rhett v. Poe*, 2 How. 457; *Valk v. Simmons*, 4 Mason, 113; *Allen v. King*, 4 McLean, 128; *Kinsley v. Robinson*, 21 Pick. 327; *Gillespie v. Cammack*, 3 La. An. 248; *Foard v. Womack*, 2 Ala. 368, 371; *Hoffman v. Smith*, 1 Caines, 157, 160. But see *Pons v. Kelly*, 2 Hayw. 45, 47; *Richie v. McCoy*, 13 Smedes & M. 541. See also *Orear v. McDonald*, 9 Gill, 350, 358.

though that is by no means clear; but whether that be the case or not, acceptance does not certainly show that the drawer had reasonable ground; at most it but indicates a presumptive right to draw, and hence only presumptively entitles the drawer to insist upon the usual steps for fixing his liability.¹

Another special feature of a drawer's contract is that where the drawer draws upon himself he is not entitled to notice if the paper is dishonored;² for, drawing upon himself, Drawing on one's self. he was in honor bound to accept. He may accordingly be treated as the maker of a promissory note.³ In that view it seems to be unnecessary to make any demand of acceptance or payment of him. The same is true where a corporation or a partnership draws upon itself, or where one draws upon a partnership of which one is a member; and so also, it seems, of the case of drawing paper by one partnership upon another, where the defendant drawer is a member of both.

§ 3. DRAWER OF CHEQUE.

What has been said in the last section applies mainly to bills of exchange, though it is proper to notice that the drawer of a cheque may, for some special reason not relating to funds, have had no reasonable ground to draw, and Peculiarity of drawer's contract. so be liable much like the maker of a note.⁴ But the contract of the drawer of a cheque is in itself peculiar, as we have elsewhere seen.⁵

The peculiarity of the contract in question is due, of course, to the special nature of a cheque. Cheques have sometimes been called bills, in cases in which it was not necessary to observe any distinction between the two kinds of paper; but it is never safe to assume that things which are alike are the same,

¹ See 2 Daniel, Neg. Inst. § 1082.

² N. I. L. § 121, 1.

³ Fairchild v. Ogdensburgh R. R. Co., 15 N. Y. 337; Miller v. Thomson, 3 Man. & G. 576.

⁴ See Carew v. Duckworth, L. R. 4 Ex. 313; Gage Hotel Co. v. Union Bank, 171 Ill. 531.

⁵ Ante, p. 12.

and it is certain that cheques are not, even in substance, bills of exchange.

A bill of exchange is supposed to have been drawn, as has already been seen, either upon funds in the hands of the drawee, or upon reasonable ground to believe that the drawee will honor it; a cheque is always supposed to have been drawn upon funds. The drawer of a cheque draws upon his own banker, who, where the transaction is rightful on the part of the drawer, holds money of the drawer subject to his order as manifested by cheques. A bill of exchange is oftener drawn upon some merchant or trader. The cheque is drawn with a view to prompt payment rather than to use as a means of credit,¹ — though merely to put a cheque into circulation is not in itself improper, so as to discharge the parties; a bill of exchange only performs its ordinary function when it is put into circulation; the one is drawn to obtain money, the other, often to give credit and to take the place of money as far as desired.

The consequence which the law merchant annexes to this difference is that the drawer of a dishonored cheque, not drawn upon sufficient² funds applicable to it, is in the position substantially of the maker of a promissory note; at all events, he is liable to the holder without notice of dishonor.³ Indeed, the drawer of a cheque remains liable, it seems, without notice of dishonor, though he had funds in the hands of the drawee, provided he has not suffered prejudice by the failure to give him notice, or to make an earlier demand than was made.⁴ The drawer of a bill, as we have seen, would be discharged in such a case.

The case of the drawer of a cheque thus far may be put in this way: Prima facie, the drawer is entitled to want of notice: prejudice. notice of dishonor; hence, the plaintiff must offer some legal excuse for the omission when he has failed to give

¹ *Mussey v. Eagle Bank*, 9 Met. 306.

² *Carew v. Duckworth*, L. R. 4 Ex. 313.

³ *Andrew v. Blackly*, 11 Ohio St. 89; *Carew v. Duckworth*, *supra*.

⁴ *Pack v. Thomas*, 13 Smedes & M. 11; *Mohawk Bank v. Broderick*, 10 Wend. 304, affirmed, 13 Wend. 133; *True v. Thomas*, 16 Maine, 36. See *Keene v. Beard*, 8 C. B. N. s. 372.

such notice.¹ Still, if he can show that the drawer has not, in point of fact, suffered prejudice by the omission, the plaintiff can maintain his action against him.²

The drawer of a cheque is, in a word, treated as the principal debtor *sub modo*; he is not discharged either by failure to make presentment within the time required in the case of a bill of exchange payable (like a cheque) on demand, or by want of notice of dishonor upon presentment and refusal to pay, unless the drawer has suffered some loss or prejudice thereby, and then only to the extent of his loss.³ Reasonable ground to draw will not help the drawer of a cheque in such a case. For example (hypothetical): A draws a cheque on his banker B, payable to C or order. C holds the cheque for a week; within which time, on any day, he might reasonably have presented it to B for payment. When the cheque was drawn, B was solvent and paying his customers' cheques, and continued to do so for several days afterwards. Before the cheque is presented B stops payment, and the cheque is dishonored, and A is not notified. Subsequently B makes an arrangement with his creditors, and ultimately pays them, including A, in full. A is liable on the cheque regardless of the delay in presenting it, and the want of notice of dishonor. Again: In the same case, C omits for ten days to present the cheque, though he might have presented it on any day before. Meantime B fails; but before his failure A withdraws all his funds from B. A is not discharged by C's delay.⁴ Again: In the same case B compromises with his

¹ *Kirkpatrick v. Puryear*, 93 Tenn. 409; *Chitty*, *Precedents in Pleading*, 117, 3d Lond. ed. See *id.* form 15, p. 83; *Carew v. Duckworth*, L. R. 4 Ex. 313, declaration; *Kemble v. Mills*, 1 Man. & G. 757, 769, approving form in *Chitty*. Nor can the holder have recourse, in such a case, to the original cause of action, in the absence of evidence permitting. *Kirkpatrick v. Puryear*, *supra*; *Carroll v. Sweet*, 13 L. R. A. 43; s. c. 128 N. Y. 19; *Smith v. Miller*, 43 N. Y. 171; 52 N. Y. 545.

² *First National Bank v. Buckhannon Bank*, 80 Md. 475.

³ *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Robinson v. Hawksford*, 9 Q. B. 52; *Little v. Phenix Bank*, 2 Hill, 425, 428; *Bell v. Alexander*, 21 Gratt. 1; *Morrison v. McCartney*, 30 Mo. 183; *Griffin v. Kemp*, 46 Ind. 172. See *Keene v. Beard*, 8 C. B. N. s. 372; N. I. L. § 193.

⁴ *Kinyon v. Stanton*, 44 Wis. 479.

creditors, including A, at fifty cents on the dollar. A is liable on the cheque for half the sum named in it. Again: In the same case A leaves all his funds with B, and loses the whole. A now is discharged by reason of C's delay.¹

On the other hand, the holder of a cheque is protected (with an exception to be mentioned) where he has exercised the Diligence of holder of cheque: circulation of same. diligence which would satisfy the law in the like case of a bill of exchange; in such a case no showing of loss or prejudice due to failure to exercise greater diligence would be heard. For example: The holder of a cheque which he receives on Saturday morning presents it on Monday afternoon during banking hours, and the cheque is dishonored, — the bank having stopped payment Monday at noon. The holder might have presented the paper on Saturday, or on Monday before noon, when it would have been paid. The diligence required in the case of a bill of exchange has been exercised, and the drawer is not discharged.²

And even though the holder fail to exercise the diligence which would be required if the cheque had been a bill of exchange, the drawer will be discharged only to the extent of prejudice. Whether the delay is in demand of payment or in the giving of notice of dishonor, or in both, makes no difference.

This, however, supposes that the cheque has been kept out unduly. The difference between a cheque and a bill in that respect has already been noticed; a bill payable at or after sight may be kept out in circulation for a long period of time without affecting the liability of any of the parties, though the drawee fail, meantime, to the prejudice of the drawer; whereas, a cheque should with reasonable promptness be presented for

¹ *Kinyon v. Stanton*, 44 Wis. 479; *Jones v. Heiliger*, 36 Wis. 149. In all of these cases the drawer of a bill would be discharged. It should be remembered that neither a cheque nor a bill of exchange operates as an assignment of the fund or (until acceptance, in the case of a bill) makes the drawee a debtor to the holder. In some States, however, drawing a cheque operates as an assignment of the amount called for. *Munn v. Burch*, 25 Ill. 35. Ante, p. 50.

² See Story, Notes, § 493; Bills, §§ 470, 471; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Simpson v. Pacific Ins. Co.*, 44 Cal. 139.

payment,¹ which means, if the holder and drawee reside in the same place, on the day, or day after, it is taken,² or, if they reside in different places, that it should be sent forward to be presented for payment on the day, or day after, it is taken, excluding in either case non-secular days, — unless a sufficient reason for not doing so is shown; on pain of discharging the drawer to the extent of any prejudice to him by the default.³ That is what is meant, it seems, by the statement sometimes made, that the holder of a cheque is bound to greater diligence than the holder of a bill;⁴ and the statement is founded upon the fact that a cheque is not naturally an instrument of credit.

§ 4. PRESENTMENT FOR ACCEPTANCE.

For most purposes there is no occasion for separating the contract of drawer from that of indorser in regard to presentment for acceptance; what is true of the one case is true of the other, and hence the subject will be reserved, in the main, for consideration with the other subjects belonging in common to drawing and indorsement, and treated under the latter head as the larger one.⁵

Peculiarity of drawer's situation: drawer contracts for acceptance.

There is one phase, however, of the law relating to presentment for acceptance which is peculiar to the drawer's contract;

¹ N. I. L. § 193: 'A cheque must be presented for payment within a reasonable time after its issue.' *Watts v. Gans*, 114 Ala. 264. Reasonable time in the case of a cheque is the shortest time within which, consistently with ordinary business, presentment can be made. *Watts v. Gans*.

² *Smith v. Miller*, 43 N. Y. 171; s. c. 52 N. Y. 545; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Simpson v. Pacific Ins. Co.*, 44 Cal. 139; *Alexander v. Burchfield*, 7 Man. & G. 1061.

³ *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Gregg v. Beane*, 69 Vt. 22, 26; *Kirkpatrick v. Puryear*, 93 Tenn. 409; *Watts v. Gans*, 114 Ala. 264; *Industrial Trust Co. v. Weakley*, 103 Ala. 458. See *Woodruff v. Plant*, 41 Conn. 344. There should be no unnecessary use of agents, with their days of additional time. *Gregg v. Beane*, supra. Unless the cheque is drawn for circulation, or unless statute authorize. *Id.* See *First National Bank v. Miller*, 37 Neb. 500; *Gifford v. Hardell*, 88 Wis. 538; *Holmes v. Roe*, 62 Mich. 99.

⁴ *Mohawk Bank v. Broderick*, 10 Wend. 304, 307, affirmed, 13 Wend. 133; *Gough v. Staats*, 13 Wend. 549, 551, 552.

⁵ See N. I. L. §§ 150 et seq.

unless, indeed, there happen to be an indorsement upon the paper when it is so presented, in which case the law would apply to the indorsement as well. A bill of exchange payable at a stated time after date need not be presented for acceptance.¹ However, according to the better doctrine of the law merchant, the drawer's contract, in the case of a bill of exchange, looks, in all cases in which the bill is not payable on demand, to an acceptance as well as to payment by the drawee. That is, the drawer is understood to engage in favor of the payee, or subsequent holder, that the drawee will give him, at any time, the special security of acceptance;² which of course, in the case of paper payable after date, or a stated time after sight, may be long before the maturity of the bill, and thus be a matter of great importance.

That undertaking of the drawer may be broken by the refusal of the drawee to accept the bill; there being then, upon due notice (which the law requires), a breach of contract on the part of the drawer, he is in principle, and by the current of authority, liable on the bill at once, regardless of the fact that payment of the bill, by the *drawee*, may not be required by the order for a long time thereafter. For example: A draws a bill of exchange on B, in favor of C, dated Jan. 1, 1893, payable three months after date. On Jan. 2, 1893, C presents the bill to B for acceptance, and acceptance is refused; the paper is duly protested, and A is duly notified. A is liable on the bill at once; C need not wait until the time stated in the bill before suing.³

The real meaning then of the drawer's contract, in the eye of the law merchant, is that the holder shall have the drawee's acceptance if he desires it, which being given, he shall then have payment by the drawee at the stated time; but that, if the drawee refuse acceptance (or payment), the sum shall be due at once from the drawer;⁴ though it must be remembered

¹ Walker v. Stetson, 19 Ohio St. 400.

² Aymar v. Sheldon, 12 Wend. 439.

³ 3 Kent, 95; Bank of Washington v. Triplett, 1 Peters, 25; Union Bank v. Hyde, 6 Wheat. 572; Weldon v. Buck, 4 Johns. 144; Mason v. Franklin, 3 Johns. 202; Thompson v. Cumming, 2 Leigh, 321.

⁴ N. I. L. § 158.

that it is part of the drawer's contract, in ordinary cases, that all steps necessary to liability in other cases shall be taken, whether on non-acceptance or non-payment after acceptance. Indeed, though presentment for acceptance may be unnecessary, yet if asked for and refused the usual steps are required on pain of *discharging* the drawer, and not merely for the purpose of fixing his liability.

All this, it must be understood, is applicable to paper payable at, or at a stated time after, sight, as well as to paper payable at, or at a stated time after, date, save that presentment for acceptance in the former case is necessary. And, as has already been intimated, if there happen to be an indorsement upon the paper, the indorser also may be made liable, and sued at once ; for his contract, as well as that of the drawer, is broken.

In Pennsylvania, however, a special view of the law merchant upon the foregoing subject obtains. It is there held that where presentment for acceptance is made in a case in which the step is unnecessary, as it is where the paper is payable at a stated time after date, presentment for acceptance, if refused, is to be regarded as nugatory, — that is, no rights can arise against the drawer. The holder must wait until the stated time for payment arrives, and then present the paper for payment as if nothing before had been done.¹ If presentment was *necessary*, refusal to accept would probably give an immediate right of action, in Pennsylvania as well as elsewhere, assuming that all steps were taken; for now the holder has done an act which the drawer required him to do.

The Statute deals with presentment for acceptance thus: Such presentment must be made (1) where the bill is payable after sight, or in any other case where presentment for acceptance is necessary to fix the maturity of the instrument; (2) where the bill expressly stipulates for such presentment; or (3) where the bill is drawn payable elsewhere than at the residence or place of business of

Where presentment to be made.

¹ House v. Adams, 48 Penn. St. 261.

the drawee. In no other case is presentment for acceptance necessary to make any party to the bill liable.¹

Except as otherwise provided by the Statute, the holder of a bill required as just stated to be presented for acceptance must present it for acceptance or negotiate it within reasonable time; failing which, the drawer and all indorsers are discharged.²

Presentment for acceptance must be made at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some one authorized to accept or refuse acceptance on his behalf.³ If addressed to two or more not partners the bill must be presented for acceptance to all of them, unless one is authorized to act for the rest, when presentment to him alone will suffice.⁴ Where the drawee is dead, presentment may be made to his personal representative.⁵ If the drawee has been adjudged bankrupt or insolvent, or has made an assignment for creditors, presentment may be made to him or to his trustee or assignee.

A bill may be presented for acceptance at any time when a negotiable instrument may be presented for payment. When (by the New York Statute) Saturday is not otherwise a holiday, presentment for acceptance may be made before noon thereof.⁶

A bill is dishonored by non-acceptance (1) when duly presented for acceptance, such acceptance as the Statute requires is refused or cannot be obtained; or (2) where presentment for acceptance is excused and the bill is not accepted.⁷

If a bill duly presented for acceptance is not accepted within the time prescribed, the person presenting it must treat the bill as dishonored or lose his right of recourse against the drawer and indorsers.⁸ If the bill is dishonored by non-acceptance immediate recourse may be had against the drawer and indorsers, and no presentment for payment is necessary.⁹

¹ N. I. L. § 150.

² Id. § 151.

³ Id. § 152.

⁴ Id. § 152, 1.

⁵ Id. 2.

⁶ Id. § 153.

⁷ Id. § 156.

⁸ Id. § 157.

⁹ Id. § 158.

CHAPTER VIII.

INDORSER'S CONTRACT

(INCLUDING DRAWER'S, OF THE SAME TENOR).

§ 1. DRAWER AND INDORSER: DEFINITION.

IN accordance with what was said in the chapter relating to the Drawer's Contract, all that part of the drawer's contract which is of the same tenor as the contract of an indorser will be considered under the present head, Subject for consideration. and that too without further mention, except so far as may be needful, of the drawer. That is to say, all that hereafter appears in regard to the indorser's contract will apply equally to the contract of drawer; what is peculiar to the drawer's contract having been considered in Chapter VII. 'Indorser' therefore should be taken to include drawer, in this chapter and others, so far as the contracts of the two are alike.

Indorsement is an act whereby a person, not being acceptor or quasi-acceptor, surety or guarantor proper, writes his name upon the back or face ¹ of a duly executed, negotiable bill of exchange, promissory note, or cheque, ² with or without terms of contract or liability, according to What constitutes indorsement. the law merchant, or writes an equivalent contract on a separate paper, annexed to the bill, note, or cheque; ³ to which act the

¹ *Shain v. Sullivan*, 106 Cal. 208.

² A negotiable cheque may be indorsed, with the usual consequences. *Keene v. Beard*, 8 C. B. N. s. 372; *Shaw v. Jacobs*, 89 Iowa, 713, 717; *Doppelt v. National Bank*, 175 Ill. 432; *Gage Hotel Co. v. Union Bank*, 171 Ill. 531. Thus, temporarily, a cheque may be made an instrument of credit, without certification.

³ N. I. L. § 38: 'The indorsement must be written on the instrument itself, or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.' If written on a paper annexed to the instrument, such paper is called an 'allonge.'

drawing of a bill of exchange is, for the purpose now in hand, an equivalent.

It has indeed been said that an unnegotiable instrument (a promissory note) may be indorsed by the payee so as to create the same rights and duties between the payee and the 'indorsee' as if the instrument were negotiable.¹ But that may well be doubted. The law merchant, by which alone such rights and duties are created, knows nothing of indorsement of non-negotiable paper. The so-called indorsement if followed by delivery would pass the title; but it would pass the title as of the common law, and nothing more, apart from statute or special agreement. In other words it would merely be evidence of a sale and assignment of the instrument.²

§ 2. WHO MAY OR MUST INDORSE.

Indorsement may be made by the holder of the instrument, or by one having no interest in it. When by the holder indorsement is an order upon the maker, drawee, or acceptor to pay the sum named to the next holder named, or to his order, or the bearer, according to its form, and has therefore a similar effect to drawing a bill of exchange. When done by one having no interest in the paper, indorsement merely adds security to the instrument.

If the instrument is on its face, or by indorsement, payable to order, indorsement by the holder is necessary to pass the title by the law merchant; that is, to give to the next holder legal ownership and a corresponding right of action upon the instrument.³ If the instrument is on its face, or by indorsement, payable to bearer, indorsement is not necessary to pass the title. The instrument in such a

Instruments
payable to
order.

¹ Story, Promissory Notes, § 128.

² There appears to be no authority for the statement in Story.

³ The maker of a note payable to his own order must himself indorse it, to pass the title. *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596. But the indorsement will not affect his liability as maker. *Id.* An instrument payable to '— order' may be indorsed, so as to pass the title, by the maker or drawer. *Chamberlain v. Young*, 1893, 2 Q. B. 206.

case passes by delivery ; and where the instrument itself is payable to bearer, that will still be true though a special indorsement (as 'Pay to the order of A') be written upon it. But the special indorser will be liable to those only who make title through his indorsement.¹ Unnecessary indorsements may be struck out.² If the instrument is on its face payable to a person named, without words of negotiability, there can be no proper indorsement of it ;³ but if on its face there are words of negotiability, it may be indorsed after an indorsement making it payable to a person named, without addition of the words 'or order' or the like.

Where indorsement is required to pass the (legal) title, transfer without indorsement, though with full intent to pass title, is no more than an assignment, and passes only an equitable title to the instrument.⁴ Standing on such a title, the new holder can have no better rights than the person from whom he took the paper. For example : A is payee of a note payable to his order, but illegal in his hands. He transfers the paper to B for value and without notice, but without indorsement. The note is invalid in B's hands.⁵

By the law merchant, apart from statute, indorsement need not, it has been held, be in the name of the indorser; enough

¹ N. I. L. § 47.

² Id. § 55 ; *Middleton v. Griffith*, 57 N. J. 442 ; *Dugan v. United States*, 3 Wheat. 172.

³ Ante, p. 84.

⁴ So of an assignment in fact, by separate paper. *Gaylord v. Nebraska Bank*, 54 Neb. 104.

⁵ *Lancaster Bank v. Taylor*, 100 Mass. 18 ; *Goshen Bank v. Bingham*, 118 N. Y. 349 ; *Jenkinson v. Wilkinson*, 110 N. C. 532 ; *Slater v. Foster*, 62 Minn. 150 ; *Beard v. Dedolph*, 29 Wis. 136 ; N. I. L. § 56. But if the omission of indorsement was due to *mistake*, the transferee could compel indorsement by suit in equity. *Brown v. McHugh*, 35 Mich. 50, 52. And if that proceeding were had before maturity and before knowledge of the invalidity of the paper, the result would be to give the transferee a perfect title, as if there had been an indorsement in the first place. *Lancaster Bank v. Taylor*, *supra*. After maturity it would be too late, according to that case, and also according to *Whistler v. Forster*, 14 C. B. N. s. 248. See *Goshen Bank v. Bingham*, *supra*, and note to N. I. L. § 56. But see *Beard v. Dedolph*, *supra*.

that it is his act, intended as indorsement.¹ For example: The payee of a bill of exchange payable to his order writes upon the bill '1, 2, 8,' for a substitute for his signature as Name of indorser. indorser, and transfers the instrument to the plaintiff. The act is held to be indorsement.² Again: The wife of the payee in such a case, acting as the authorized agent of the payee, writes her own name upon the note. That is deemed indorsement by the payee.³

When indorsement is required, in order to pass title, the act must be done by him who has the legal title, though the entire Holder of legal title to indorse. beneficial interest be in another.⁴ Thus, one to whose order as trustee a promissory note is payable must indorse it, to pass the title to another; indorsement by the cestui que trust would pass the equitable title only, and payment could not be enforced in favor of the indorsee. So where paper is made payable to A, to the order of B, the meaning is that it is payable to A only upon the order of B; hence, B must indorse it in order to give to A the full right of legal ownership. Again, upon the death of the holder of paper the legal title passes to his executor if he left a will, or to his administrator if he died intestate; and this though the deceased gave the

¹ It must be the act of the owner, unless it is an accommodation indorsement; indorsement of the owner's name by another person of the same name, without authority, would not pass the title. It would be forgery. *Beattie v. National Bank*, 174 Ill. 571; *Cochran v. Atchison*, 27 Kans. 728.

² *Brown v. Butchers' Bank*, 6 Hill, 443. In case of a mistake in the name or spelling of the name of the payee or indorsee such person may indorse in the name or spelling given, and add, if he think fit, his proper signature. N. I. L. § 50.

³ *Stevens v. Beals*, 10 Cush. 291. This is an exception to the fundamental rule that the instrument itself should disclose the parties and their rights, so that external evidence need not be resorted to. Such indorsements would certainly be contrary to the custom, and in sound theory should be good only where the peculiar indorsement is explained on the instrument itself. The truth appears to be that 'indorsements' like those of the text have been interpreted as if the transaction were one of the common law, an essentially unsound view.

⁴ So he who has the legal title is the person to sue upon the instrument. *Berney v. Steiner*, 108 Ala. 111.

paper by will specifically to another. Hence, the executor must indorse it to pass title, if it is payable to order, to give the legatee the right to sue upon or to transfer it.¹

This rule finds frequent expression in cases of paper payable or indorsed to a partnership. The legal title being in the partnership, nothing short of an act by the firm can be indorsement. It makes no difference to whom the paper is to be passed; one of the partners, acting merely in his own right, could not indorse the paper even to his sole co-partner.² Of course the partner might indorse the paper over as the act of the partnership; and it would perhaps make no difference that he did it in his own name, if the act were the act of the firm.³ Nor would the act be ineffective because the instrument was indorsed by the firm over to one of the partners. Such indorsee could not, indeed, maintain an action upon the paper against the partnership; but his right of action would be perfect against other parties.⁴

Upon the death of a member of the partnership, the survivors may indorse, in the name of the partnership, paper payable or indorsed to the firm. The survivors acquired by survivorship full and complete title to such paper for the purpose of settling the affairs of the now dissolved partnership, and hence, for indorsing over the paper; the proceeds going to the benefit of the estate of the deceased partner to the extent of his interest.⁵

A different rule prevails, it seems, in those cases in which indorsement of the firm paper is not necessary to pass title; that is, where the paper is payable to bearer, or is already indorsed in blank. In such a case it does not follow that because, by the articles of partnership or agreement between the part-

¹ *Crist v. Crist*, 1 Cart. (Ind.) 570. See also *Hersey v. Elliot*, 67 Maine, 526. The executor or administrator will indorse 'without recourse.'

² *Estabrook v. Smith*, 6 Gray, 570; *Robb v. Bailey*, 13 La. An. 457.

³ *Estabrook v. Smith*, *supra*. But see note 3, *supra*, p. 86.

⁴ So a note made by a partnership payable to the order of one of the partners may be indorsed over by the payee so as to give a good title to his indorsee. *Thayer v. Buffum*, 11 Met. 398.

⁵ *Story*, Promissory Notes, § 125; *Crawshay v. Collins*, 15 Ves. 218, 226; *Jones v. Thorn*, 2 Mart. N. s. 463. See note to *Gilmore v. Ham*, 40 Am. St. Rep. 561-576; 1 Daniel, Neg. Inst. 370 et seq.

ners, partnership paper is to be passed only by the partnership, the partnership indorsement is necessary towards third persons, in order to pass the legal title. No indorsement by a member of the partnership in his own personal right would pass title in favor of a person having notice of the wrongful act; but the instrument itself might not carry notice, and one who purchased for value and without notice would acquire a perfect title.¹ And upon the death of one of the partners, it would not be necessary, it seems, for the survivors to indorse such paper over as surviving partners.²

There is much doubt whether the same rule would apply concerning such cases of indorsement where the firm has been dissolved, not by death, but by the act of the parties, or by the law. There are authorities which deny the power of one of the partners to indorse the paper over in such a case,³ even though that partner have authority to settle up the partnership business.⁴ Perhaps this is the better doctrine. The contrary would be true, however, if the indorsee had no notice of the dissolution,⁵ or if the paper was payable or indorsed to the particular partner (for the partnership) who after dissolution indorsed it.⁶

If the instrument is payable either on its face or by indorsement to two or more persons not partners, all must indorse it, to pass the title, unless one has authority to indorse for all.⁷ In the latter case the indorsement ought in principle to be in the name of all.

A bill, note, or cheque payable to the order of one who is
 Indorsement named on the instrument as agent for another is
 by agent. payable by the custom, *prima facie*, to his principal's order; and no indorsement by the agent is needed to give

¹ That is because no indorsement is necessary, in the case put, to pass the title. Whether indorsement is by the firm or not is immaterial, in such a case.

² *Attwood v. Rattenbury*, 6 J. B. Moore, 579.

³ *Sanford v. Nickles*, 4 Johns. 224 ; *Woodson v. Wood*, 84 Va. 478.

⁴ *Abel v. Sutton*, 3 Esp. 108 ; *Humphries v. Chastain*, 5 Ga. 166 ; *Foltz v. Pourie*, 2 Desaus. Eq. 40.

⁵ *Cony v. Wheelock*, 33 Maine, 366.

⁶ *Temple v. Seaver*, 11 Cush. 314.

⁷ N. I. L. § 48.

the principal or any subsequent holder a perfect title. So if the instrument is payable or indorsed to the order of a cashier or other fiscal officer of a bank, it is by the custom payable to the order of the bank itself, and may be indorsed accordingly. For example: A promissory note is payable to the order of 'A, Cashier' of a bank. The note is payable to the order of the bank, and the cashier's indorsement is not necessary to pass the title.¹ The rule has been extended by the Statute to instruments payable or indorsed to the order of any corporation. But such agent may still indorse for his principal.²

§ 3. PARTIAL INDORSEMENT.

Again there can be no transfer, according to the law merchant, that is with all the consequences of that law, by indorsement which passes less than the entire title to the paper,³ where indorsement is necessary to pass title. For example: A makes a promissory note for \$500, payable to the order of B. B writes thereon 'Pay \$400 of this note to C or order,' and signs the direction. C cannot maintain an action against A on the note even to recover \$400.⁴ Nor could C sue B on his 'indorsement.'⁵

Part interest in the paper could no doubt be transferred, because alienation is an incident of property; but the transfer would be in virtue of the common law, and the ^{Partial indorse-}rights of the parties in respect of the transaction ^{ment.} would be rights of the common law, not of the law merchant. The law merchant knows nothing of such transactions.⁶ Sev-

¹ *First National Bank v. Hall*, 44 N. Y. 395; *Lookout Bank v. Aull*, 93 Tenn. 645.

² N. I. L. § 49; 'When an instrument is drawn or indorsed to a person as cashier or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.' See *Falk v. Moebis*, 127 U. S. 597. But as to this case see *Hately v. Pike*, 162 Ill. 241, 245.

³ N. I. L. § 39.

⁴ *Lindsay v. Price*, 33 Texas, 282.

⁵ *Douglass v. Wilkeson*, 6 Wend. 637.

⁶ But see *Citizens' Bank v. Walton*, 31 S. E. Rep. (Va.) 890, and qu. There may, as we have seen, be acceptance for part of a bill of exchange. And there

eral joint indorsers might however, in indorsing the entire interest, designate between themselves, on the instrument, their particular shares of the burden, for the act would not necessarily cut down the right of the indorsee. And perhaps an accommodation indorser might indorse for part of the sum, since such an indorser is not owner of the instrument and his indorsement therefore is not necessary to pass title.

§ 4. MODES OF INDORSEMENT.

Indorsement is a technical act by the law merchant, and can be effected only in certain ways. In the first place the act, Indorsement as the definition states, must be in writing; in the should be ac- second place it must be according to the law mer- cording to law chant. merchant. The first of these rules, as well as the second, is a requirement of the law merchant, not originally of any statute. In regard to the second, the act is according to the law merchant, as declared in the Statute, when the indorsement is special or in blank, or when it is restrictive, qualified, or conditional.¹

Indorsement is special, according to the Statute, when it specifies the person to whom or to whose order the sum named Special is payable; it is in blank when it does not.² The indorsement. distinction between these two in substance, as has already been seen, is that, after special indorsement, indorsement by the person named thereby is necessary to pass the title to the instrument; while after indorsement in blank further indorsement is unnecessary, the instrument passing by delivery.³ The holder has the right to convert a blank indorsement into a special one by writing over the signature of the indorser in blank a proper direction for payment to himself or to himself or order.⁴

is some semblance of authority for the opinion that, *before* acceptance, there may be an indorsement as to part of the sum named. See *Pownal v. Ferrand*, 6 Barn. & C. 439; *Beawes*, pl. 286. But the better view is *contra*. *Chitty, Bills*, 235, note. See also the remark of *Parke, B.*, on the argument in *Oridge v. Sherborne*, 11 Mees. & W. 374.

¹ N. I. L. § 40.

² *Id.* § 41.

³ *Id.*

⁴ *Id.* § 42.

Indorsement is restrictive, according to the Statute, (1) when it prohibits the further negotiation of the instrument, as where it reads 'Pay to A only,' (2) when it constitutes Restrictive the indorsee agent of the indorser, as where it indorsement. reads 'For collection,' or (3) when it vests the title in the indorsee in trust for or to the use of another.¹ The restrictive indorsee has the right to receive payment of the instrument, to bring any action upon it which the indorser could bring, and to transfer his rights as such indorsee consistently with the instrument.²

Indorsement, by the Statute, is qualified when it constitutes the indorser a mere assignor of the instrument, as where he adds to or writes before his signature the words 'without recourse.'³ The negotiable character of the instrument is not affected by such an indorsement.⁴

Indorsement is conditional, within the meaning of the Statute as it seems, whenever it is accompanied by written words of lawful condition other than those imported of Conditional indorsement by the law merchant. Conditional indorsement, in other words, makes or may make a double condition or set of conditions, to wit, those of the law merchant (if these are not affected by the indorsement), and the special added condition. Such indorsement does not affect the negotiable properties of the instrument itself;⁵ it affects simply the rights and liabilities of the conditional indorser, according to the tenor of the condition, whether relating to title or to liability.⁶

¹ N. I. L. § 43.

² Id. § 44. Subsequent indorseees acquire only the title of the first indorsee under the restrictive indorsement. Id. If the instrument in origin is negotiable, it continues so until restrictively indorsed or discharged. Id. § 54.

³ Corbett v. Fetzer, 47 Neb. 269. Where the words follow the signature and then there is another indorsement, it may be shown by evidence to which indorsement the words belong. Id. It matters not that the holder thought that they belonged to the second indorsement if they did not. Id.

⁴ N. I. L. § 45.

⁵ Tappan v. Ely, 15 Wend. 362.

⁶ The holder can strike out or disregard the conditional indorsement where

Indorsement may on the other hand, by waiving any or all the steps otherwise necessary to fix the indorser's liability, enlarge the holder's rights.

Waiver of steps.

Any indorsement may be made by two or more persons jointly, as where the indorsement is by partners, or where it is by several persons united in interest in the transaction. It will not make an indorsement by two or more a joint indorsement that they indorse at the same time, though they may have been led to do so by the same inducement; their interest in the transaction must be joint, — they must have undertaken to share the contract together,¹ which may be shown to be the fact.² When such is the case they are, notwithstanding their individual indorsements, all joint indorsers towards the holder, their own indorsee, though not to subsequent holders in due course. Between themselves, however, they are not indorsers at all; that is, one of them could not maintain an action against one of his associates as an indorser,³ nor indeed could one without his associates, after taking up the paper, maintain an action against any party to it.⁴

Joint indorsement.

As has been said already, indorsement is an act of the law merchant, to be done according to the law merchant. Whether a particular act is according to the law merchant should, it seems, be determined by the question of its conformity to the custom. What the custom is may be inferred from what has been stated. To write one's name simply

Conformity to law merchant.

his title does not depend upon it, and sue the other parties accordingly. See N. I. L. § 46.

¹ *Shaw v. Knox*, 98 Mass. 214; *Hogue v. Davis*, 8 Gratt. 4. Successive indorsers for accommodation of another are presumptively liable in the order of their indorsement. *Shaw v. Knox*, *supra*; *Moore v. Cushing*, 162 Mass. 594.

² *Harrah v. Doherty*, 111 Mich. 175.

³ *Shaw v. Knox*, *supra*.

⁴ Under the Statute joint payees or joint indorsees who indorse are deemed to indorse jointly and severally (that is, towards subsequent holders). N. I. L. § 75.

upon the instrument; or in connection with it to write 'Pay to A or order,' or the like, or 'Pay to A only,' or 'for collection, or 'in trust,' or 'without recourse,' or 'upon condition,' naming the condition, or 'waiving demand' or 'demand and notice,' or 'protest,' or the like; such would be according to the law merchant, because they are of custom.

Material departures from the custom should not, in sound theory, be admitted to the footing of indorsement, but should stand upon their own footing according to their terms. In other words the common law or equity, according to the case, and not the law merchant, should be applied to the rights and liabilities of the parties to such transactions. This doctrine however has sometimes been overlooked, and transactions in terms which, apart from their connection with instruments of the law merchant, would be governed by principles of the common law or of equity, have been treated as indorsement within the law merchant.

Some authorities appear indeed to have gone the length of declaring that any writing by the holder of a negotiable instrument, which purports to transfer his title thereto, may be construed to mean indorsement. For example: The holder of a negotiable note writes on the back of it, 'I this day sold and delivered to A the within note,' or 'I hereby sell and assign all my right and title to this note,' adding his signature. This has been deemed indorsement according to the law merchant.¹ Again: In like case the writing is, 'I hereby guaranty the payment of this note.' This too has been treated as indorsement.² Again: The defendant writes on the back of a negotiable note an agreement by himself to pay the note 'as if by me indorsed.' This has (perhaps with better reason) been held indorsement.³

¹ *Adams v. Blethen*, 66 Maine, 19; *Markey v. Corey*, 108 Mich. 184; s. c. 36 L. R. A. 117; *Sears v. Lantz*, 47 Iowa, 658; *Merrill v. Hurley*, 55 Am. St. Rep. 859, 866; *Hatch v. Barrett*, 34 Kans. 230.

² *Partridge v. Davis*, 20 Vt. 499. See *Tuttle v. Bartholomew*, 12 Met. 452, referring to various cases so holding and rightly repudiating them. See also *Belcher v. Smith*, 7 Cush. 482.

³ *Pinnes v. Ely*, 4 McLean, 173.

Such doctrine may well be doubted; to sell and deliver is not to indorse according to the law merchant, nor does the act become indorsement by the fact that it is evidenced by writing and signature upon a negotiable instrument. The owner of a non-negotiable instrument might 'sell and deliver' it, and note the fact by writing and signature on the instrument; but the act, though of the same nature as in the case in question, would not be indorsement.¹ So to 'sell and assign' is not to indorse, though written and signed by the owner of a negotiable note. If done upon a separate instrument, it clearly would be nothing more than a transfer of title, legal or equitable according to circumstances;² and it could not be more by attaching such instrument to the note or by writing the words upon the note. The distinction between assignment and indorsement is plain enough. And so of writing a guaranty upon the instrument; guaranty is a very different undertaking from indorsement, and might of course be added to an indorsement proper,³ as often is done.

Criticism of the doctrine mentioned must not however be considered as suggesting that there is no place for construction or interpretation of the language used. It may well be that words may be used not in strict conformity to usage but still as bearing the import of indorsement according to the law merchant; in such a case the words must be interpreted accordingly. But if the words do not import a special or blank *indorsement*, or a restrictive, qualified, or conditional *indorsement*, as those terms have been explained, they should not be taken to import indorsement according to the law merchant. For example: Above the defendant's signature, on the back of a negotiable promissory note, is written, 'Rec'd one year's interest on the within, May 10, 1871.' This imports, not indorsement according to the law merchant, but only acknowledgment of interest paid: and the defendant cannot be

¹ Merchants' Bank v. Gregg, 107 Mich. 146; Story v. Lamb, 52 Mich. 525. But the courts of Michigan distinguish the two cases. Markey v. Corey, *supra*.

² Gaylord v. Nebraska Bank, 54 Neb. 104.

³ See Elgin Banking Co. v. Zelch, 57 Maine, 487.

held as indorser without evidence showing that his signature has no connection, or not the connection it appears to have, with the words of receipt quoted.¹

§ 5. INDORSEMENT AS AN ORDER OF PAYMENT.

When indorsement is made by the holder of the instrument, as distinguished from one who indorses for accommodation, the act is an order upon the maker, acceptor, or drawee to pay the sum named to a designated indorsee, or to his order, or to bearer, according to the nature of the indorsement. If the indorsement is special, such order appears in terms upon the instrument; if it is in blank, the order is the legal effect of the indorsement.

When indorsement an order of payment.

It is often stated as an inference that indorsement by the holder is equivalent to drawing a bill of exchange for the amount named in the instrument indorsed. Such statements however should be taken only as a free expression of a general truth. To put the matter accurately, it should rather be said that indorsement is equivalent to drawing a bill or to drawing a cheque, according to circumstances. The indorsement of a cheque cannot properly be said to be equivalent to drawing a bill; for the question would arise at once, if the statement were made with full purpose, What kind of bill, a foreign or an inland bill? The difference is material. Dishonored indorsement of a cheque does not require protest to fix the indorser's liability; while the contrary is true of fixing the liability of the drawer of a dishonored foreign bill.

It may be said, however, that indorsement is equivalent to drawing an inland bill; but why that rather than equivalent to drawing a foreign bill, — that is, why that, so far as the nature of indorsement is concerned, especially in a case in which the cheque or the note is drawn or made and payable in different States? And then in regard to indorsement of a bill of exchange, could it be said that indorsement of a foreign bill was equivalent to drawing an inland bill? That again would be to change the nature of the instrument.

¹ Clark v. Whiting, 45 Conn. 149.

This shows that so far as there is any equivalency, the equivalency must have relation to the particular instrument, — indorsement of a foreign bill to the drawing of a foreign bill, indorsement of an inland bill to the drawing of an inland bill, indorsement of a cheque to the drawing of a cheque, indorsement of a promissory note to the drawing of an inland bill.

At best the equivalency is only for certain purposes; in no case is indorsement equivalent to the drawing of a bill for any of the special purposes considered in Chapter VII., such, for instance, as in regard to the rule of drawing without funds. Another important particular in which there is no equivalency will be noticed by referring to certain remarks on a preceding page concerning special indorsement; where it was seen that indorsement by such words as 'Pay to A' would not cut off negotiability, whereas a bill so drawn would not be negotiable.

Indeed, the statement that indorsement is equivalent to drawing a bill is misleading in many cases, and necessary in none. It would have been better to say that indorsement is an order on the drawee, acceptor, or maker to pay, according to the tenor of the instrument. That would be strictly true. But the statement under consideration is too well fixed in the language of the law-books to be discarded; hence, as we must have it, it must be explained.

§ 6. ORDER OF LIABILITY.

The holder of an instrument bearing several indorsements made before he acquired title has the right presumptively to

Presumptive order: who may be sued.	sue the indorsers (whose liability has been fixed) in any order he pleases and obtain judgments accordingly, until he has received satisfaction. He
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is not bound to sue the last indorser. Between the indorsers themselves the order of liability runs back towards the party primarily liable, and never in the opposite direction. But any indorser prior in time to the indorser who, having taken up the paper, is now suing upon it, may be sued. Such indorser is no more required to sue the last prior indorser than is the holder at the end of the indorsements.

The order of time of the indorsements is presumptively that of the succession of the signatures upon the instrument; the drawer in the case of a bill of exchange or a cheque being treated as a first indorser. But the presumption from the succession of signatures is not conclusive; and evidence is admissible between the parties to the transaction to show the actual order of liability, whether by showing that a prior signature in the written succession was in fact later than one or more following it, or by showing some special agreement between the indorsers.¹

Order of time :
order of names
not conclusive.

§ 7. NATURE OF THE CONTRACT.

The contract unmodified of the indorser of an inland bill of exchange, or of a promissory note, or of a cheque, is that he will pay to the holder the sum named in the paper upon the following conditions precedent, where presentment is for payment: (1) Due presentment and demand; (2) Due notice of dishonor. Of a foreign bill of exchange: (1) Due presentment and demand; (2) Due protest; (3) Due notice of dishonor.

Where presentment of a bill of exchange is for acceptance, and acceptance is necessary, the contract of an indorser of an inland bill is for payment upon the following conditions precedent: (1) Due presentment and demand; (2) Due notice of dishonor. Of a foreign bill: (1) Due presentment and demand; (2) Due protest; (3) Due notice of dishonor. Where acceptance is not necessary, then, *in case of* due presentment for acceptance, — of an inland bill, due notice of dishonor; of a foreign bill, due protest and due notice of dishonor.²

All this leads to a consideration of the steps necessary to fix

¹ *Bank v. Layne*, 101 Tenn. 45; *Morrison Lumber Co. v. Lookout Mountain Hotel Co.*, 92 Tenn. 6; *Blackmore v. Granberg*, 98 Tenn. 277; *Moore v. Cushing*, 162 Mass. 594; *Ewan v. Brooks-Waterfield Co.*, 55 Ohio St. 596; *Castle v. Rickey*, 44 Ohio St. 490. See N. I. L. § 75.

² On the nature of the contract of anomalous indorsement, see ante, p. 46.

Where the holder of a bill of exchange drawn in a set indorses two or more of the parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills. N. I. L. § 187.

the indorser's liability, transforming it from a conditional to an absolute obligation. But there is another subject which may properly be disposed of first.

§ 8. INCIDENTS OF THE CONTRACT.

As the indorser undertakes to pay on performance of the conditions precedent named in the last section, it follows that in an action against an indorser it is not necessary for the plaintiff to prove the genuineness of *prior* signatures, or of the promise or order itself which he has indorsed, or the existence, capacity, or authority of the prior parties to contract. It was usual in former times to say, accordingly, that the indorser by his indorsement *admitted* such genuineness, existence, capacity, and authority;¹ the admission being conclusive in favor of a holder of the instrument in due course. And that is still the rule in England, under the Statute, so far as the Statute goes.²

But without authority of any custom it has for a long time come to be common for courts to say that indorsement is a *warranty* of the supposed facts, genuineness, existence of the parties, and their capacity and authority to contract as they appear to have done.³ Obvi-

¹ See among other cases *State Bank v. Fearing*, 16 Pick. 533; *Glidden v. Chamberlain*, 167 Mass. 486, 494; *Coggill v. American Bank*, 1 Comst. 113; *Bank of Commerce v. Union Bank*, 3 Comst. 230; *Braithwaite v. Gardiner*, 8 Q. B. 473; *Smith v. Marsack*, 6 C. B. 486; *Barlow v. Bishop*, 1 East, 432.

² Bills of Exchange Act, § 55, (2): 'The indorser . . . is *precluded* from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements'; also 'from denying . . . that the bill [or other instrument] was at the time of his indorsement a valid subsisting bill, and that he had then a good title to it.' The drawer of a bill 'is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.' *Id.* § 55, (1).

³ *Dale v. Gear*, 38 Conn. 15; *Willis v. French*, 84 Maine, 593; *Prescott Bank v. Butler*, 157 Mass. 548, 550; *Erwin v. Downs*, 15 N. Y. 575; *Lennon v. Grauer*, 159 N. Y. 433 (indorsement *contracts* for genuineness); *Crosby v. Wright*, 70 Minn. 251; *McKleroy v. Southern Bank*, 14 La. An. 458; *Birmingham Bank v. Bradley*, 103 Ala. 109. See also *First National Bank v. First National Bank*, 58 Ohio St. 207; *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 200; *Northwestern Bank v. Bank of Commerce*, 107 Mo. 402.

ously this is not a necessary result of the indorser's conditional undertaking to pay; and, in the absence of plain public policy calling for it, the existence of such a warranty, taking the word in its ordinary sense, should depend upon the custom. The judicial dicta (and generally the language of the courts in the matter is nothing more) have however become so common as to create the belief that warranty is an incident of indorsement; and the Statute at last has confirmed the belief and turned a number of loose and unnecessary dicta into law,¹ while at the same time it follows the custom in regard to the incidents of the contracts of the drawer and of the acceptor, treating *their* acts as admissions merely.²

The Statute accordingly declares that indorsement without qualification 'warrants' in favor of subsequent holders in due course that the instrument is genuine, and in all respects what it purports to be; that the indorser has a good title to it; that all prior parties had capacity to contract; and that the instrument at the time of indorsement was valid and subsisting; — all this 'in addition' to the undertaking of indorsement of its own inherent force according to the law merchant.³

It is not quite clear however whether the Statute uses the word 'warrants' in its proper legal sense, or in some secondary sense which would make it mean that indorsement is a conclusive admission of the things named, in favor of holders in due course. If that be its meaning, the only criticism to be made is that it does not say so, and hence perpetuates instead of removing a doubt. But the fact that the American Statute departs, at this point, from the English Statute, on which it is based, which indeed it generally follows *ipsissimis verbis*, and that it makes a distinction in terms between the incidents of indorsement and those of drawing and accepting, leads to the inference that the

Uncertainty of
the Statute:
difficulties.

¹ N. I. L. § 73. That the language of warranty is loosely used in the cases is seen by the fact that courts of the same State speak of the act now as an admission, now as a warranty. See *Glidden v. Chamberlain*, 167 Mass. 486, 494 ('admits'); *Prescott Bank v. Butler*, 157 Mass. 548, 550 ('warrants').

² *Id.* §§ 68, 69.

³ *Id.* § 73.

word ('warrants') is used in its primary sense. Something certainly is meant beyond indorsement according to the legal import of that act, for the indorser 'warrants,' 'and in *addition* he engages,' etc.

Assuming that the word is used in its proper legal sense, some difficulties cannot escape notice. The 'warranty,' if broken at all, is broken when made; for in the case supposed some prior indorsement for instance was not genuine, or some prior party was not competent to contract. Is there then a right of action by reason of the breach of warranty regardless of the fact that payment of the instrument may not be due at the time, and hence without the steps (presumptively) required for fixing the indorser's liability? What does 'in addition' mean? Do the words mean that there are two separate and distinct contracts? That would be their natural meaning, and if that is their real meaning then the indorser becomes liable absolutely for breach of warranty, or conditionally upon his indorsement, at the holder's election. But it is hard to believe that an innocent indorser can be held to pay where the steps prescribed by the law merchant have not been taken.¹ Perhaps the way out of the difficulty is to construe the words 'in addition' (with what follows) as a proviso in regard to the indorser's liability for breach of the warranty; thus making him liable on his warranty only after the ordinary steps for fixing his liability as an indorser. That however would put the warranty, so far, virtually to silence.

Whatever be the meaning of the Statute, it is still true that the indorser cannot allege want of genuineness or capacity, or the like, of prior signatures or parties. The Statute What remains clear. certainly has not *cut down* the rule of the unwritten law merchant. The rule is clear to the extent named. For example: The defendant is indorser and the plaintiff indorsee in due course of a promissory note payable to the order of A, and purporting to bear A's indorsement. The steps for fixing the defendant's liability have been taken. But it is

¹ This might of course be after the indorser had been discharged from liability by omission of the steps, as well as before maturity.

conceded by the plaintiff, if the evidence is admissible against him, that the supposed indorsement by A is a forgery, of which however both parties were ignorant at the time of the defendant's indorsement. The evidence is not admissible, and the defendant is liable notwithstanding the forgery.¹ Again: The defendant is indorser and the plaintiff indorsee in due course, of a promissory note, executed by a person incompetent to contract to the plaintiff's knowledge when he took the note. The defendant's liability has been duly fixed; but he now sets up the incapacity of the maker. That is no defence.²

It should be noticed that the warranty of the Statute is made negotiable, like the indorsement itself; though warranty, being a contract of the common law, is not naturally negotiable.

The warranty
is negotiable.

Another question of a kindred nature has given the courts trouble; to wit, Does this warranty or admission by the indorser of the validity of the paper as it stands disqualify such indorser to give testimony to the invalidity of the paper in a suit against (not the indorser, but) some prior party? Such party may of course set up the invalidity of his own contract against a holder having notice; but can he produce the indorser as a witness? In the time of Lord Mansfield the question was answered in the negative; no person, it was held, could be permitted to give testimony to invalidate an instrument to which he had given his signature; having given a credit to it, he could not afterwards discredit it.³

Competency of
indorser to
impeach the
instrument.

But the rule was not satisfactory to the English courts, and some twelve years later, after narrowing it to negotiable instruments, they overturned it, and held the indorser competent notwithstanding his indorsement.⁴ In this country there is a

¹ *State Bank v. Fearing*, 16 Pick. 533; Cases, 91.

² *Erwin v. Downs*, 15 N. Y. 575; Cases, 93. See *Lennon v. Grauer*, 159 N. Y. 433. The decision in the two cases would no doubt be the same under the Statute; the warranty may be used by way of estoppel as well as a contract.

³ *Walton v. Shelley*, 1 T. R. 296.

⁴ *Jordaine v. Lashbrooke*, 7 T. R. 601.

conflict of authority, some of the courts having followed the earlier English rule,¹ others having followed the later one,² while still others have adopted a middle course. It will only be necessary to state the rule adopted by courts taking the middle ground. According to that rule, the indorser is a competent witness to impeach the validity of the paper, if the plaintiff took with notice, otherwise not.³ But the better and more general rule treats him as competent in either case. The rule of exclusion applies in any case only in regard to facts of the time of the execution of the contract sued upon.⁴

§ 9. APPARENT BUT NOT REAL INDORSEMENT (INTER PARTES).

What appears on its face to be an ordinary indorsement, and therefore, *prima facie*, is indorsement, may often, between the parties thereto and subsequent holders in like case, be shown to be something else, and that consistently with regarding the terms to be supplied by law, in order to make out the contract, as fixed;⁵ for that assumes that there is nothing in the circumstances, as distinguished from the actual terms, of the contract to affect it. Thus while evidence should not be admissible to show simply that what appears to be an indorsement in blank was understood to have been intended as indorsement without recourse, evidence of the time and circumstances under which it was made is admissible, between immediate parties, and this may vary its effect materially, even to making it on the one hand practically an indorsement without recourse, or on the other of raising the grade of liability, or indeed of modifying it in any one of several ways.

¹ *Treon v. Brown*, 14 Ohio, 482.

² *Townsend v. Bush*, 1 Conn. 260; *Cases*, 94; *Haines v. Dennett*, 11 N. H. 180; *Stafford v. Rice*, 5 Cowen, 23; *Williams v. Walbridge*, 3 Wend. 415; *Freeman v. Brittin*, 2 Harr. (N. J.) 192; *Taylor v. Beck*, 3 Rand. 316; *Stump v. Napier*, 2 Yerg. 35.

³ *Thayer v. Crossman*, 1 Met. 416; *Newell v. Holton*, 10 Gray, 349; *Clapp v. Hanson*, 15 Maine, 345. See *Davis v. Brown*, 94 U. S. 423.

⁴ *Woodhull v. Holmes*, 10 Johns. 231; *Skilding v. Warren*, 15 Johns. 270; *Strong v. Wilson*, Morris, 84; *Drake v. Henly*, Walker (Miss.), 541.

⁵ *Witherow v. Slayback*, 158 N. Y. 649.

Thus, an indorser may show against his own indorsee that his own indorsement was made at the same time with that of one or more other indorsements, as part of one common transaction by which the parties named became jointly bound. That could not be done against a holder for value without notice; but it could be shown against one who had taken the paper *with* notice, so as to require him to sue them all together, if at all. And it could be shown between such indorsers themselves, if one of them, having taken up the paper, should call upon another to pay as a prior indorser; for we have already seen that joint indorsers are not indorsers at all between themselves.¹

What appears to be the ordinary contract of indorsement unmodified, may be shown to be something else also in the following cases: The relation of principal and agent may be shown to exist between the plaintiff and the defendant; in such a case the agent acquires nothing of his own, — he merely holds in right of his principal. Again, it may be shown that the paper was indorsed to the holder for some special purpose, and is held in trust, as where it was indorsed for collection merely. And again the relation of principal and surety may be shown to exist between the parties, as where the indorsement was made by the defendant at the request and for the accommodation of the plaintiff; that too would defeat liability altogether.² Or it might be shown, with the same result, that both plaintiff and defendant were co-sureties on the paper for another person. Or again, it might be shown that there was a defence arising from a transaction of which the giving the instrument was only a part, the transaction including an agreement that the instrument should be taken in sole reliance upon the responsibility of the maker or acceptor, and that it was indorsed in order to transfer the title in pursuance of such agreement, so that the attempt to enforce payment of the defendant would be in the nature of a fraud.³

¹ See *Shaw v. Knox*, 98 Mass. 214

² *Case v. Spaulding*, 24 Conn. 578.

³ Upon this whole subject, see *Dale v. Gear*, 38 Conn. 15; *Downer v. Cheseborough*, 36 Conn. 39; *Chaddock v. Vanness*, 35 N. J. 517; *First National Bank v. National Marine Bank*, 20 Minn. 63.

These are the chief cases in which what appears to be an ordinary indorsement may be shown to be something else, or rendered inoperative towards giving the immediate indorsee a right of action thereon. But where the defendant or the plaintiff makes an attempt to prove that what stands as a clear and unambiguous contract of indorsement was not intended to be such, merely by the declarations of the parties made at the time, — as by showing that the defendant in indorsing understood that he was not to be liable, and that the plaintiff received the indorsement accordingly, — that attempt, according to the current of authority, will not be allowed to succeed.¹ The law merchant has a sufficient and an exclusive way of exempting indorsers from liability, to wit, by requiring them to write ‘without recourse’ or the like words in connection with their indorsement. It matters not therefore whether the indorser’s contract be called a written contract; the ‘parol evidence’ rule of the common law has nothing to do with it.²

¹ *Bank of United States v. Dunn*, 6 Peters, 51; *Davis v. Brown*, 94 U. S. 423 (permitting evidence of contemporaneous *written* agreement); *Bigelow v. Colton*, 13 Gray, 309; *Hitchcock v. Frackelton*, 116 Mich. 487; *Dale v. Gear*, 38 Conn. 15, explaining *Case v. Spaulding*, 24 Conn. 578; *Charles v. Denio*, 42 Wis. 56; *Eaton v. McMahon*, id. 484; *Rodney v. Wilson*, 67 Mo. 123; *Doolittle v. Ferry*, 20 Kans. 230; *Martin v. Lewis*, 30 Gratt. 672; *Woodward v. Foster*, 18 Gratt. 200; *Citizens’ Bank v. Walton*, 31 S. E. (Va.) 890; *Clarke v. Patrick*, 60 Minn. 269; *Kulenkamp v. Groff*, 71 Mich. 675; *Phelps v. Abbott*, 114 Mich. 88; *Doom v. Sherwin*, 20 Cal. 234; *Citizens’ Bank v. Jones*, 121 Cal. 30. See *Equitable Ins. Co. v. Adams*, 173 Mass. 436, as to the mere understanding of an indorser. The courts of some States would admit evidence of the kind if the indorsement were in blank. *Ross v. Espy*, 66 Penn. St. 481; *Harrison v. McKim*, 18 Iowa, 485; *Iser v. Cohen*, 1 Baxter, 421; *Rogers v. Bedell*, 97 Tenn. 240; *United States Bank v. Geer*, 55 Neb. 462; *True v. Bullard*, 45 Neb. 409. These cases stand upon the erroneous notion that the ‘parol evidence’ rule of the common law applies to the case. Ante, pp. 5, 6.

² See ante, pp. 5, 6.

CHAPTER IX.

INDORSER'S CONTRACT CONTINUED: PROCEEDINGS
BEFORE DISHONOR.§ 1. PRESENTMENT AND DEMAND DISTINGUISHED: MODE
OF THE STEPS.

THE first thing to be done to fix the liability of an indorser is to make presentment and demand; which in the case of promissory notes or cheques will be for payment; in the case of bills of exchange may be either for ^{Presentment and demand required.} acceptance or for payment, according to circumstances. In ordinary cases it is not necessary to draw any distinction between presentment and demand, and therefore the two are often treated as one, either term — presentment or demand — being used indifferently as including all that the law so far requires.

In point of fact, however, the two are separate and distinct steps, and the law requires both or some equivalent or substitute. Sometimes it may accordingly be necessary to distinguish between the two, as where the defendant contends that one or the other was omitted. Hence the nature of each should be pointed out.

But the terms themselves fairly indicate their ordinary meaning. Presentment is the act of handing over the paper to the maker, drawee, or acceptor, or at least of ex- ^{Meaning of the acts.}hibiting it to him, with a view to payment or acceptance according to the case and the purpose; demand is a request upon the party, at the same time, to accept or pay, according to the case and the purpose. That is the ordinary meaning of the terms; and the ordinary meaning is now the subject for consideration: excuses of presentment and demand will be considered in another place.

Presentment is required by law, not indeed to *charge* the party primarily liable¹ (unless there be a clear condition to that effect), but — (1) To enable the party called upon to judge of the genuineness of the paper, for which purpose (and for the next one) he may keep it for a short time; (2) To enable him to judge of the holder's right to the paper; (3) Where presentment is for payment, that on payment he may have possession of the paper as a voucher, or for any other needful purpose.² Demand is necessary to show the holder's purpose to require the maker, drawee, or acceptor to do what has been undertaken for. There need not be any words of demand or request, however, or of presentment, if the act of the holder in presenting is understood to mean what such words would only in another way convey; not the form, but the substance, is what the law requires.³

An equivalent to handing over or exhibiting the paper may, as we have intimated, satisfy the law in regard to presentment.

Equivalents of presentment and demand. In the case of paper not payable on its face or by notice at some bank, there can hardly be an equivalent to the handing over; there may be a waiver, of which hereafter; but waiver dispenses with the requirement instead of being equivalent to it. But in the case of paper payable at bank the law permits an equivalent, or rather a substitute, for what is naturally meant by presentment; the fact that the paper is in the bank at maturity, to the knowledge of the bank, satisfies the law, so far as presentment is concerned, where the paper is on its face payable at such bank.⁴ And this upon the plain ground that it would be a mere ceremony, in most cases of the kind, to require the holder to come to the

¹ N. I. L. § 77.

² *Musson v. Lake*, 4 How. 262; N. I. L. § 81. See also *Arnold v. Dresser*, 8 Allen, 435. The interest of the maker or acceptor in presentment is important to remember, for it explains how such party can by waiver at maturity cut down rights of an indorser; the maker or acceptor waives his own rights, and the corresponding ones of the indorser are gone, by necessary consequence.

³ *Waring v. Betts*, 90 Va. 46.

⁴ *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

bank which already has the paper, call for it, and stand there with it, perhaps till the close of its business hours, in waiting for the payor, or — what would be silly — to offer it back to the bank in the name of presentment.

However, it is not the presence of the paper in the bank that is treated as equivalent to or a substitute for handing it over; it is the presence of the paper there (1) at maturity, (2) to the knowledge of the bank, that satisfies the law.¹ It is not enough that the holder has sent the paper to the bank before maturity, though that fact might be material in a suit against the bank for neglect of duty in the matter; it is not enough that the paper was in the bank at maturity, though that might be still more important in such a suit against the bank. If the bank knew nothing of the presence of the paper, the paper might as well not be there, for in such a case the bank cannot do the real thing required, — make the payment.²

There is another case of equivalency, by local custom, in relation to presentment. In cases of the kind just referred to, the paper is on its *face* payable at the bank named; but it is not uncommon in certain States for the holder to send the paper to the bank with which he usually deals, for collection. In such a case the practice is for the bank to notify the maker, drawee, or acceptor that it holds the paper for collection, and requests payment. Then if the paper is left in the bank until its maturity, that will satisfy the requirement of presentment.³ Of this case too it should be observed that it is not the notice of the bank that constitutes presentment (or demand), but the presence of the paper in the bank at maturity.

In the same cases of instruments payable at bank, it is equally obvious that the law cannot insist upon demand in the ordinary sense. The instrument is to be lodged in the bank, and the maker or other payor knows the fact, and if he intends to pay will provide the bank with the funds before or on the day of the maturity, or may have funds on deposit generally with

¹ *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

² *Id.*

³ *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13, 23. See also *West v. Brown*, 6 Ohio St. 542; *Cases*, 108.

the bank subject to the payment of his paper. The bank accordingly, if the instrument has been lodged with it for collection, has but to look at his books to see whether the party has provided for payment if he does not appear; and looking over its books completes demand of payment, if done at the right time; to wit, at the close of business hours on the day of maturity. Even that may not be necessary if the bank knows that there is nothing there with which to make payment; to look over the books in such a case would be idle. Lodging the instrument in the bank for collection appears to be the essential feature of demand.

It appears to answer the requirement of presentment that the holder, having the instrument with him, but not exhibiting it when he makes demand, so describes it as to leave no doubt that the payor must understand of what instrument the demand is made.¹ Still the paper must be produced if it is called for.²

§ 2. PLACE OF PRESENTMENT.

A clear line of cleavage runs through the whole law relating to the indorser's contract between paper payable (on its face or by notice) at bank, and paper not payable at bank. Paper payable at bank or not. With regard to the first of the two, the process of presentment has already been described in speaking of equivalents. But it should be observed that where the instrument is payable at any place designated by it, whether at bank or elsewhere, presentment should be made at that place; presentment anywhere else will be of no avail in fixing an indorser's liability, apart from waiver or sufficient modification of the contract.³

An instrument payable 'at bank' is payable at any bank in

¹ *King v. Crowell*, 61 Maine, 244; *Arnold v. Dresser*, 8 Allen, 435; *Etheridge v. Ladd*, 44 Barb. 69.

² *Ocean Bank v. Fant*, 50 N. Y. 474; N. I. L. § 81.

³ N. I. L. §§ 79, 80; *Hutchison v. Crutcher*, 98 Tenn. 421. Presentment must be made at a bank at which the instrument is payable though the bank may have passed into the hands of a receiver. But if the bank designated be closed at maturity and a new bank takes its place, no demand is necessary. *Hutchison v. Crutcher*, *supra*. Further see *Central Bank v. Allen*, 16 Maine, 41; *Berg v. Abbott*, 82 Penn. St. 177.

the place of payment, and may be lodged for payment accordingly.¹ In the case of a bank having branches, ^{Branch banks} cheques are payable at the particular branch at which the drawer keeps his account; hence presentment should be made there in all cases in which the holder has notice or is informed of the proper place.² He would no doubt be told where to go if he presented the paper at the wrong place, and hence could not treat the refusal as a dishonor. If not in any way informed, he may have made a good presentment, though he made it at the wrong place.

The drawee of a bill of exchange may designate any place within the city or town in which the bill is payable as the place of payment,³ but cannot require presentment in another city or town.⁴ It remains to consider ^{Drawee may name place of payment.} cases of presentment of paper payable at no place designated.

If no place of payment is designated on the paper, — in which case the paper is commonly spoken of as ‘payable generally,’ — it is payable at the address given, if any, on the ^{Payable} instrument,⁵ otherwise at the place of business or ^{generally.} of residence of the maker or acceptor; that is, in the absence of any special agreement between the parties.⁶ In regard to oral agreements changing the place of payment from that designated by law, there is some slight want of harmony in the authorities, one or two cases appearing to deny the admissibility of evidence to show such agreement.⁷ But the better view treats the doctrine of place of presentment, as it is laid down by law, as intended only to supply any want of evidence, and not as fixed

¹ *Hazard v. Spencer*, 17 R. I. 561. To lodge the instrument for payment in a trust company would not be sufficient. *Nash v. Brown*, 165 Mass. 384.

² *Prince v. Oriental Bank*, L. R. 3 App. Cas. 325, 332; *Woodland v. Fear*, 7 El. & B. 519.

³ *Troy Bank v. Lauman*, 19 N. Y. 477.

⁴ *Niagara Bank v. Fairman Manuf. Co.*, 31 Barb. 403; *Walker v. Bank of New York*, 13 Barb. 636. But compare *Mason v. Franklin*, 3 Johns. 202.

⁵ N. I. L. § 80, 2.

⁶ N. I. L. § 80, 3.

⁷ *Pierce v. Whitney*, 29 Maine, 188; *Anderson v. Drake*, 14 Johns. 114 (dictum); *Story, Notes*, § 49, and note.

and absolute, and accordingly admits evidence of any agreement or understanding on the subject.¹

In the absence, then, of agreement, the legal designation prevails; and in the absence of a designated address the law, it seems, designates the place of business, if there be one, as presumptively the place for making presentment.² The place of business is (probably) preferred in law to the place of residence, because at the party's place of business rather than at his residence he expects to meet his engagements, especially to attend to calls for money. The consequence is that presentment at the residence of a maker or acceptor having a known place of business would, in principle, in the absence of sufficient reason, be insufficient in case of refusal. We say 'in principle,' for the authorities have not often had occasion to speak plainly to the point, and many of them accordingly have been content with saying generally that presentment should be made at the place of business or of residence.³

There is no doubt that presentment at the place of business is good; the only doubt is whether presentment there is required. But whatever the rule on that point, 'place of business' must be taken in a real, substantial sense. It is not enough that some place has been used temporarily for the transaction of some particular piece of business, such as merely settling up old books or accounts; it must be the regular, known place for the transaction of the ordinary, general business of the party, including the payment of bills. The counting-room of a merchant would be a proper place for presentment; a mercantile club-room ordinarily would not be. The general room of a workshop, or any part of a workshop having no office, would be

¹ *Pearson v. Bank of Metropolis*, 1 Peters, 89; *State v. Hurd*, 12 Mass. 171; *Sussex Bank v. Baldwin*, 2 Harrison (N. J.) 487.

² *King v. Holmes*, 11 Penn. St. 456; *West v. Brown*, 6 Ohio St. 542. See *Bank of Red Oak v. Orvis*, 42 Iowa, 691.

³ See *Sussex Bank v. Baldwin*, 2 Harrison (N. J.), 487; *Brooks v. Blaney*, 62 Maine, 456; *King v. Crowell*, 61 Maine, 244; *Malden Bank v. Baldwin*, 13 Gray, 154. So too, unfortunately, in the Statute. N. I. L. § 80, 3: 'Where no place of payment is specified, and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment,' the presentment is made at the proper place.

no place for making presentment; the place would indeed be a place of business, but not a place of business at which the owner in ordinary cases, would be apt to pay his bills.

Indeed, an office at which one pays one's bills, among other things, is enough to make presentment there good, if not to require presentment there. For example. The maker of a promissory note has a room, occupied also by other persons for business purposes, in which he is accustomed to receive business calls, and at which he directs such calls to be made. Presentment of the note is made there, and not at the maker's residence. The presentment is good.¹

If, however, the maker or acceptor has no such known place of business, the holder must make demand at his residence, if, again, he has a known residence, or one which Place of residence. can be found by reasonable diligence. If there is neither place of business nor of residence so to be found, the holder has nothing to do in the way of presentment except in person or by his agent to be in the town in which the paper is payable, at maturity, ready with the paper to receive payment.²

But the maker or acceptor may have removed; and the holder has not performed his duty in the matter of presentment by merely seeking out the last known place of business or residence of the party, and failing to find there the person sought. That is not presentment, Removal of maker or acceptor. nor is any case of excuse made by such facts. For example: The defendant is indorser of an accepted foreign bill of exchange, which has been protested for dishonor. The protest sets out a 'presentment' made 'at the late place of business' of the acceptor, 'to the person there in charge,' who answered demand of payment by saying, 'the acceptor is not here now, nor have we any funds' with which to pay. That does not disclose facts sufficient to constitute presentment and demand; reasonable diligence requires further inquiry.³

¹ West v. Brown, 6 Ohio St. 542.

² Meyer v. Hibsher, 47 N. Y. 265; Malden Bank v. Baldwin, 13 Gray, 154.

³ Brooks v. Blaney, 62 Maine, 456; Freeman v. Boynton, 7 Mass. 483.

Indeed, it is the duty of the holder to follow the maker or acceptor upon his removal, if he has not removed beyond the State; or rather the holder should exercise reasonable diligence to find him. If by such diligence he can find the maker or acceptor, he must exercise the diligence.¹ If the maker or acceptor has removed beyond the State, since the paper was made or accepted, the holder performs his duty in the matter of place of presentment, by calling for payment at the party's last place of business or of residence according to the particular case.² Whether that is *necessary* is disputed; by the better view it is.³ In some States, indeed, it is held that diligence must be exercised to obtain payment even where the maker or acceptor has absconded.⁴ But of such matters under the head of excuses. Of course, if the maker or acceptor lived in another State when the paper was made or accepted, the paper must be sent forward for presentment there.⁵

The place of date of the paper is *prima facie* evidence of the place for presentment, if no other is indicated upon it; but it is only *prima facie* evidence.⁶ The date, whether
Place of date. of place or time, is no necessary part of the contract, and the actual fact may be shown. Even where paper is payable 'at the office' of the maker or acceptor, the place of date does not necessarily fix the place for presentment; wherever the party's 'office' is, there presentment should be made.⁷

¹ Exercising diligence will be enough, though it fail of effect. *Bank of Utica v. Bender*, 21 Wend. 643; *Cases*, 191.

² *Taylor v. Snyder*, 3 Denio, 145. See N. I. L. § 80, 4.

³ *Wheeler v. Field*, 6 Met. 290. Contra, *Gist v. Lybrand*, 3 Ohio, 308; *Foster v. Julien*, 24 N. Y. 28, *Mason, J.*, dis.

⁴ *Pierce v. Cate*, 12 Cush. 190. But see contra, *Lehman v. Jones*, 1 Watts & S. 126; *Duncan v. McCullough*, 4 Serg. & R. 480.

⁵ *Taylor v. Snyder*, *supra*.

⁶ *Childs v. Laffin*, 55 Ill. 156; *Blodgett v. Durgin*, 32 Vt. 361; *Taylor v. Snyder*, 3 Denio, 145.

⁷ *Childs v. Laffin*, *supra*.

§ 3. TIME OF PRESENTMENT.

Coming to the question of the time of presentment, we encounter a distinction between presentment for acceptance and presentment for payment, which must first be disposed of.

Distinction:
presentment
for acceptance.

Presentment for *acceptance* is necessary, as has heretofore been observed, only in the case of bills payable at sight, and not then if by law the instrument is not entitled to grace. But bills payable at a time stated after date may be presented for acceptance, as the drawer is considered to contract that the holder shall have the security, if he will, of acceptance.¹

With regard to bills payable at a stated time after date, the holder may make presentment, if at all, at any time before maturity of the bill. It is doubtful whether there could be a presentment for acceptance, in any case, after maturity; presentment after maturity would naturally be for payment. But that is not material, for all indorsers would be discharged by failure to present the instrument for payment at maturity, except such as had waived the requirement, and such as may have indorsed after maturity.

Bills payable
after date.

With regard to bills payable at or at a stated time after sight, the case is different. The law merchant requires presentment of such paper within a reasonable time; but that rule is interpreted to permit the circulation of such paper indefinitely before presentment, so that the Statute of Limitations does not run out. That is to say, the contract of the drawer and indorsers of such a bill is that the holder may present the bill at any time within the period of the Statute of Limitations, provided that the paper is kept in circulation meantime; when finally presentment for acceptance is made, the taking of the other steps required in case of dishonor will accordingly fix liability. For example: A sight bill is sent from Chicago to a distant territory on the day of its date. After some detention in the mails it reached its destina-

Bills payable
after sight:
circulation.

¹ N. I. L. § 68.

tion, when the holder puts it into circulation at the first opportunity, and it is then kept in circulation as well as the thinly settled condition of the territory permitted. Without unnecessary delay it is presented to the drawee thirty-five days after its date. The presentment is good.¹ Again: The defendant in London indorses to the plaintiff a bill of exchange drawn in London on A at Calcutta, payable to order sixty days after sight. The bill is dated March 5. On April 30 following the bill is indorsed by the plaintiff in England to A of Calcutta; on May 22 next the bill is sent to India, and received there early in October; shortly afterwards it is presented for acceptance, and acceptance is refused; due protest and due notice of dishonor follow. It is for the jury to say whether the bill was presented to the drawee in reasonable time; the fact that the paper was kept out in circulation for so long time not being in itself unreasonable.²

The bill should, however, be kept in circulation, as far as circumstances reasonably permit, or it should be presented for acceptance; it should not be locked up. To lock it up, which means to hold it when it might reasonably be passed on in circulation or sent forward for presentment, would discharge the drawer and indorsers.³ What is a reasonable holding, and hence not a locking-up, must depend upon circumstances, as the examples above given show. In cases lying on the border, the question of reasonableness must ordinarily be left to the jury; in clear cases the court will rule on the facts. The court would rule that to keep a bill an entire day could not be unreasonable; it has been ruled that to hold an inland bill payable after sight in London until the fourth day after receiving it, within twenty miles of London, is not unreasonable.⁴

The rule, indeed, is not a hard and fast one. It may be entirely changed by custom; if there be a clear and determinate usage of trade at the place of payment, which regulates the time

¹ *Montelius v. Charles*, 76 Ill. 303.

² *Muilman v. D'Eguino*, 2 H. Black. 565.

³ *Id.*; *Goupy v. Harden*, 7 Taunt. 159; *Mellish v. Rawdon*, 9 Bing. 416; *Middleton Bank v. Morris*, 28 Barb. 616.

⁴ *Fry v. Hill*, 7 Taunt. 397. See *Harker v. Anderson*, 21 Wend. 372.

of presentment, that usage is considered as entering into the contract of the drawer and indorsers, and presentment must be made accordingly.¹

It has been said that to indorse paper after maturity is equivalent to drawing a bill at sight, so far as time is concerned.² But that is clearly a mistake. It cannot be necessary Paper indorsed to present such paper for acceptance, as would be after maturity. necessary by the unwritten law merchant of sight bills; the paper too might be a promissory note or a cheque. The true view of the case is that indorsement after maturity amounts to an order to pay *on demand*.³

Next of presentment for payment, in the same matter of time; and first, of grace according to the unwritten law merchant. The cardinal rule in ordinary cases is that presentment for payment must be made at maturity, — that is, on the day when by law payment is due. If the paper is payable on demand, and by the Statute,⁴ if it is payable at sight, the paper is not entitled to grace; it is due presently, and presentment may be made on the day of delivery, or on any other day, excepting non-secular days. In other words, the paper is at its maturity all the time. Its maturity is passed by the law merchant upon the expiration, after issuance, of a reasonable time,⁵ a matter regulated by statute in some States, at least in regard to promissory notes. The rule applies to such instruments, as well as to others, that presentment after maturity is too late to fix the liability

Unwritten law
as to grace:
demand paper.

¹ Story, Bills, § 231; Mellish v. Rawdon, 9 Bing. 416.

² Light v. Kingsbury, 50 Mo. 331; Tyler v. Young, 30 Penn. St. 144. See Bassenhorst v. Wilby, 45 Ohio St. 333, 337.

³ Pryor v. Bowman, 38 Iowa, 92; Leavitt v. Putnam, 1 Sandf. 199; Patterson v. Todd, 18 Penn. St. 426; Swartz v. Redfield, 13 Kans. 550. See Landon v. Bryant, 69 Vt. 203.

⁴ N. I. L. § 92. The Statute has been repealed in Massachusetts in regard to sight paper, and grace thereon restored. 1899, ch. 130.

⁵ N. I. L. § 78. In regard to demand paper payable *semi-annually*, see of the time for demand Beardsley v. Hawes, 71 Conn. 39. This will often include mortgage notes. Such instruments though payable on demand appear to run for six months before being overdue.

of an indorser; unless the paper is indorsed after maturity, as it may be, when it becomes due again after a reasonable time, and must be presented accordingly to bind those who indorsed after maturity.¹

In the uncommon case of paper in which grace is excluded by the terms of the paper, — the paper not being payable on demand, — payment is due, in other words the paper matures, as if it were an instrument of the common law instead of the law merchant. Thus, if the day of payment, reckoned literally, would fall on Sunday or any other non-secular day, it is due on the following day, and presentment for payment should be made on that day, not before, not after.² If two non-secular days should come together, the first being the one on which payment otherwise would be due, the paper does not reach maturity until after both those days have passed.

This leaves us with the case of paper entitled (by the unwritten law) to grace. In such cases the paper reaches its maturity three days after the time at which by its terms literally taken it would be due; and presentment should be made on the last day of grace, not before, not after. If what would be the third day of grace should be Sunday or any other non-secular day, the paper matures on the second day, or on the first day of grace if the day before is also a non-secular day. Here, indeed, is said to be a survival of the original idea of days of *grace*; these were at first, according to current statement, mere favor extended by the holder, and hence, as they could not then be required, the time cannot now be increased. However lame the reasoning, supposing it to rest on fact, the law is clear and positive; grace is cut off by the law merchant, not increased, by non-secular days at payment time. For example: The defendant is indorser of a promissory note made on the first day of June and payable one month after date. Payment is demanded on the 5th of July and refused, and notice at once given to the defendant. The defendant is not liable; presentment should have

Paper entitled
to grace : how
to reckon grace.

¹ Bassenhorst v. Wilby, 45 Ohio St. 333.

² Capital Bank v. American Bank 51 Neb. 707, 710.

been made on July 3,¹ unless that day also was a non-secular day, in which case it should have been made on July 2.²

If the instrument (entitled to grace) is on its face payable in instalments, each instalment is entitled to grace; there can be no breach of the contract, and hence no proper presentment, touching an instalment, except on the last day of grace, treating the instalment in question as if it were a separate and distinct undertaking. For example: The defendant is indorser of a promissory note dated Nov. 19, 1888, and payable by equal instalments on the 19th of November in each succeeding year for seven years. The instalment due in 1892 is the subject of the present suit; presentment for payment of which was made and refused November 22 of that year, and was followed at once by notice of dishonor. The presentment is good.³

A like rule would apply if it were provided, as often is the case, that if any instalment were not paid when due, the whole sum should be immediately due. The holder would have his election in such a case to sue for the instalment alone or for the whole sum, each claim sued upon, it seems, now requiring presentment, so far as indorsers are concerned, on the same day, the last day of grace.

The Statute abolishes grace on *negotiable* instruments altogether; every negotiable instrument is by its language 'payable at the time fixed therein, without grace.' If maturity would fall upon Sunday or a holiday, the instrument is payable on the next succeeding business day. And a special provision is made by the New York Statute in regard to instruments falling due on Saturday, to wit, that they are to be presented for payment on the next succeeding business day, except that if they are payable on demand the holder may, at his election, present them for payment before noon on Saturday when that entire day is not a holiday.⁴ In other respects the rule in regard to common law contracts appears to govern.⁵

¹ Capital Bank v. American Bank, 51 Neb. 707.

² It is of course only when the *last* day of grace would fall on a holiday that grace is affected. Bartlett v. Leathers, 84 Maine, 241.

³ Oridge v. Sherborne, 11 Mees. & W. 374.

⁴ N. I. L. § 92.

⁵ Id. § 93: 'Where the instrument is payable at a fixed period after date,

The rule in regard to time of presentment supposes, however, that there is no legal obstacle to presentment at maturity.

Should there be such obstacle, the rule yields, and
 Legal obstacle: the law in most cases, if not in all,¹ suspends the
 inevitable accident. requirement of performance of the duty until the
 removal of the obstacle;² then, or within reasonable time
 thereafter, presentment must be made.³

What is a 'legal obstacle,' within the meaning of this rule? It must be something not attributable to the holder, even in the way of mistake.⁴ Thus the holder could not, by way of justifying presentment after the day of maturity, show that he had made a miscalculation of the time when the paper became due, or that he had confused two instruments maturing at different times, and had taken the wrong one for the one in suit, or that in sending the paper forward to the place of payment he had made a mistake in the address which caused the delay. Mistake by the holder would be fatal.

On the other hand, 'inevitable accident,' to use a common term, would be a legal obstacle. Accident, as thus brought in contrast with mistake, is some unexpected event happening without the agency direct or indirect of the person to whom it happens. The mistake of another *may* therefore be an 'accident' to the holder; so it will be if the mistake was in no proper sense due to the holder, — it is then 'inevitable accident,' and presentment may be made after the mistake has been corrected. For example: The defendants are indorsers of a bill of exchange drawn in Norwich, Connecticut, on A in Philadelphia, Pennsylvania, and accepted payable at a certain bank after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.'

¹ The effect of the death of the maker or acceptor is disputed. See *infra*, p. 120.

² *Lindo v. Unsworth*, 2 Camp. 602; 12 Rev. Rep. 750; Jewish festival day, requiring Jews to abstain from secular business, held sufficient reason for delay, by Lord Ellenborough.

³ N. I. L. § 120.

⁴ Promptness in correcting a mistake, so as to make the result the same as if no mistake had been made, may, it seems, be shown. *Fielding v. Corry*, 1898, 1 Q. B. 268, as to time of notice of dishonor.

there. Shortly before the maturity of the bill the holder sends it to a banking-house in New York City for collection. Between New York and Philadelphia there are two mails daily, — one leaving New York at 9 A. M., the other at 4.30 P. M., each due at Philadelphia five hours after starting. On the morning before the day of maturity the cashier of the collecting bank encloses the bill, with others, in a letter addressed to the bank at which it is payable, and mails the letter in season for the afternoon mail of that day. The letter is duly put into the mail-bags, which leave New York at the time just mentioned; but by mistake of employees in the New York post-office the mail-bags containing letters for Philadelphia are directed to Washington. They are carried on accordingly to Washington, where the mistake is discovered; and the bags are now sent back to Philadelphia, reaching that city on the day after the maturity of the bill. That day is Sunday. On Monday morning the letter containing the bill in question is delivered to the bank to which it is addressed, and at which it is payable, and payment is presently refused. Protest and notice follow directly. The presentment is good, inevitable accident having prevented the making of it sooner.¹

The existence at maturity of war between the countries or States in which the holder and the payor respectively reside would be another legal obstacle; and withholding presentment or attempts to make presentment until the end of the war would not affect the liability of indorsers, even though the period of limitation (for natural cases) might have expired. But within a reasonable time after the end of the war presentment should be made, on pain of discharging indorsers.² What time would be reasonable would in a case of doubt be for the jury; on facts leaving no ground for doubt in the matter, the court would rule. And the courts would probably be found endeavoring to narrow the region of doubt wherever they could.

A similar case would be the existence of an epidemic at the place of payment, resulting in quarantine; and it would not matter whether the quarantine was general, embracing a whole

¹ *Windham Bank v. Norton*, 22 Conn. 213; *Cases*, 132; N. I. L. § 120.

² *Farmers' Bank v. Gunnell*, 26 Gratt. 131.

district, or a whole city, or limited only to some quarter of the city in which the paper was payable, or though it was only of the house where it was payable.

The fact that the maker or acceptor was dead when the paper matured might of course create a legal obstacle to presentment. In the first place, there may as yet be no executor or administrator, of whom alone payment could be required. In such a state of things, one of two things must be true; either the indorser's contract must hold good meantime, awaiting the qualification of a personal representative, or presentment must be excused, and the indorser's liability fixed, by taking the other steps. In some States the latter alternative appears to be accepted;¹ probably the former would be more generally accepted as the better doctrine.²

In the next place, though there may be a qualified executor or administrator at the maturity of the paper, still there may be a statutory period of exemption of such representation from suits (that is, from duty to pay demands against the estate), which may not yet have expired. In such a case, as in the one just stated, either the indorser's contract must hold good until the period expires, when presentment must be made, or presentment must be excused, and the other steps taken. The latter alternative is adopted in some States, the former in others. For example: The defendant is indorser of a promissory note, the maker of which is dead when it matures. An administrator has been appointed and has qualified. He is exempted by law from suit for one year from the time of qualification. The note matures a month after his qualification. No presentment by the law of Massachusetts and of other States is necessary;³ presentment by the law of Maine and probably of other States is necessary.⁴

¹ Hale v. Burr, 12 Mass. 86; Oriental Bank v. Blake, 22 Pick. 206; Landry v. Stansberry, 10 La. 484.

² Gower v. Moore, 25 Maine, 16.

³ Hale v. Burr, and other cases in note 1, supra. Query if *notice* is not necessary under this rule? See the statement of facts in Hale v. Burr; and see Oriental Bank v. Blake, 32 Pick. 206, holding that notice to an administrator of an indorser is necessary.

⁴ Gower v. Moore, 25 Maine, 16.

But it is not enough that presentment is made on the day of maturity or other proper day; it must be made at a reasonable time of that day, though it is possible that the plaintiff makes out his case presumptively in this respect, if the paper is payable generally, by showing that presentment was made on the right day. Time of day.

In regard to time of day a distinction like that heretofore noticed between paper payable at bank and paper not payable at bank prevails. If the paper is payable at bank, or at any mercantile house having fixed hours of business, presentment should be made within such hours; to make it before or afterwards would be of no avail in the steps to fix an indorser's liability, unless indeed the bank or house of business had some one at hand to answer calls of the kind.¹ It is common in many States, but not in all, for banks to have some one of its force remain for a time after the close of banking hours for such purpose; presentment accordingly would be good.²

The case is different if the maker, drawer, or acceptor has no place of business with early hours of closing; but the extremes of the time prescribed by law for presentment in such cases are hard to fix. It is common to say of cases of the kind that presentment may be made at any time of day between morning and night. But when does 'morning' begin and when does 'night' end within the meaning of the statement? It would be unreasonable to say that presentment might be made at any time between the beginning of day and midnight, and the law does not say so.

Payment should be called for only when, so far as time of day is concerned, it can conveniently be made. Hence it should not be called for during the hours of rest; that is, the hours ordinarily given to sleep, as, for instance, near midnight. For example: The defendant is indorser of a promissory note payable at no place designated. In the night of the day of maturity, between eleven and twelve o'clock, the holder calls up the maker, who has gone to bed, and presents the note for payment, which is refused, and notice of dishonor given. The presentment is not good.³

¹ See *Dana v. Sawyer*, 22 Maine, 244.

² *Id.*

³ *Id.*

The fact that the maker or acceptor may have retired to rest will not make the presentment improper, for he may have retired in the daytime, or in the edge of the evening, because of illness, fatigue, or anything else. The only question on this point is whether the presentment was made at a *reasonable* time of day; that question, in cases in which there is serious ground for doubt, will and should ordinarily be left to the jury. Still, the courts are inclined to push back the borders of doubt as far as they can, and so bring the case within the domain of certainty. For example: The defendant is indorser of a promissory note, payable at no designated place, and due in August. The maker lives in the country, ten miles from Boston. The note is received at maturity by a notary public, after the close of banking hours, from a bank in Boston which holds it for collection, the bank not knowing where the maker lives. After considerable inquiry the maker's place of residence is ascertained, and the notary, informed of the place, goes as soon as he can to the house, arriving there about nine o'clock in the evening. The lights of the house are out, and the inmates have gone to bed for the night. The notary calls the maker up, and presents the note for payment, and payment is refused. The presentment is good; taking into consideration the distance of the maker from the holder, the inquiry made to ascertain the maker's place of residence, and the season of the year, the time of presenting the note was reasonable.¹ Again: Presentment is made between eight and nine o'clock at the house of a grocer. The house is shut, and no one is there to give answer. The presentment *may* be good.²

¹ Farnsworth v. Allen, 4 Gray, 453. 'The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it reasonable or otherwise.' Id., Bigelow, J.

² See Triggs v. Newnham, 10 Moore, 249; s. c. 1 Car. & P. 631; Wilkins v. Jadis, 2 Barn. & Ad. 188; Morgan v. Davison, 1 Stark. 114; Barclay v. Bailey, 2 Campb. 527. The rulings on presentment appear to have been positive in these cases; but it would be unsafe to say in general that presentment in such a case would be good. There might be 'early closing' in the trade, and no good reason shown for not making presentment at the place of business during business hours.

Similar narrowing of the borders of doubt has been made in regard to presentment in the early morning. Thus presentment upon a maker at his place of residence in a city at eight o'clock in the morning has been declared too early;¹ while presentment so made in the country, at a farmer's house, would ordinarily, it seems, be reasonable.

However, rulings upon such questions are not of the same value as general rules of law, because such rulings depend so much upon the particular facts. Facts of small import in themselves often become important in cases of the kind, important enough to set aside the application of the ruling in question. The ruling is particular, not general; the examples above given cannot be taken to apply to any but very similar cases. Their chief value probably lies in their showing a disposition of the courts to extend the domain of law, and hence of certainty, as far as possible.

§ 4. PRESENTMENT, BY WHOM.

Presentment should be made by the holder, or by some one authorized to receive payment on his behalf.² According to the better rule, no one else can make a presentment such as, if refused, can be treated as a step towards fixing an indorser's liability. Confusion has arisen from the fact that in certain cases a stranger in possession of the paper may make presentment for the purpose of receiving *payment*; which is only saying that payment made to such person may operate as a discharge and satisfaction of liability. That will be the case whenever the payment is made in good faith, without notice that the holder is not owner of the paper, and the paper surrendered to the party making payment. The instrument is now extinguished, and with it of course the liability of all parties to it.³

But to say that payment may be made to a person not entitled to receive payment is not to say that presentment by such per-

¹ Lunt v. Adams, 17 Maine, 230.

² N. I. L. § 79.

³ 'A negotiable instrument is discharged by payment *in due course* by or on behalf of the principal debtor.' N. I. L. § 126.

son is good for the purpose of fixing the liability of an indorser. For that purpose presentment must be made by one who, in making it, is acting in virtue of the contract of the defendant, and who further; in the case of a promissory note or an accepted bill of exchange, can compel and not merely receive payment. The indorsement (or the drawing of bill or cheque) is an order to pay to the true holder; obviously, then, none but the true holder, or one acting on his behalf, can make a presentment that shall fulfil the terms of the indorser's contract. If presentment be good when made, as sometimes it is, by an indorser, it is good because the indorser is (not indorser, but) the authorized agent of the holder.

Upon the death of the holder, presentment should be made by his successor in title, that is, by his executor or administrator. It should not be made by any legatee, for such person, though entitled, it may be,¹ to the money when paid, could not require payment; the maker or acceptor could refuse to pay to any one but the legal representative of the late holder.

It matters not through whose hands the paper passes in making presentment, if the act be that of the owner; the intermediate persons are only his instruments. For example: A bill of exchange is sent through the post-office to the acceptor in a letter demanding payment, and is received on the day of maturity. This is a good presentment;² though it would be otherwise of a mere demand of payment of paper not sent forward or lodged in the bank making demand.

In the case of a dishonored foreign bill of exchange there may be a double presentment; and there may be and often is in the case of an inland bill or of a promissory note. The first pre-

¹ See *Crist v. Crist*, 1 Carter (Ind.), 570; Cases, 78. Perhaps he may not be entitled to receive it or any part of it, though it was given to him by will of the owner, for the owner may have been involved in debt, and his estate must first pay the creditors.

² *Prideaux v. Criddle*, L. R. 4 Q. B. 455; *Hare v. Heaty*, 10 C. B. N. s. 65.

sentment is made by the holder of the paper or by his agent, in the ordinary way ; then the paper must, if a foreign bill, *may* by statute,¹ if an inland bill or a note, be put into the hands of a notary public (or of some other public officer or respectable, disinterested person, by the unwritten law, if no notary can be found to serve), and presentment made by him.² But the action of the notary so far will be just the same, as regards time and place, as if he were holder.

In this country it is generally laid down that the notary must act in person, in the absence of statute; he cannot make presentment by a clerk or deputy.³ Indeed, it is held that the defect in making presentment by a clerk would not be cured by the notary himself making the protest.⁴ Perhaps, however, custom in large cities may be deemed to sanction the act of a deputy ; that is the case in England. It is not improbable that the rule requiring personal action by the notary was due to a mere slip by an English judge.⁵ In the case of inland bills and promissory notes, the act of a notary is not required at all, though it is generally permitted by statute.⁶

In some States statute authorizes presentment of a foreign bill by a notary's deputy, and in some States by a justice of the peace. And where, in any case, no notary resides or will act in the place of payment, any public officer may act, or if no such person is at hand or will serve, then any respectable, disinter-

¹ N. I. L. §§ 125, 159, and by earlier statute generally.

² By N. I. L. § 161, 'protest may be made by (1) a notary public, or (2) by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.' In giving no preference to the notary's act, this changes the unwritten law.

³ *Ocean Bank v. Williams*, 102 Mass. 141 ; *Donegan v. Wood*, 49 Ala. 242 ; *Hunt v. Maybee*, 3 Seld. 266 ; *Carter v. Union Bank*, 7 Humph. 548 ; *Smith v. Gibbs*, 2 Smedes & M. 479. But see *Nelson v. Fotterall*, 7 Leigh, 179.

⁴ *Smith v. Gibbs*, supra.

⁵ Buller, J., in *Leftley v. Mills*, 4 T. R. 170. See 1 Parsons, Notes and Bills, 641, note.

⁶ Unless the employment of a notary is permitted by statute, notarial fees cannot be collected in such cases. *Burke v. McKay*, 2 How. 66 ; *Union Bank v. Hyde*, 9 Wheat. 572 ; *City Bank v. Cutter*, 3 Pick. 414.

ested merchant or other private citizen.¹ Witnesses should be present in such a case.²

§ 5. PRESENTMENT, TO WHOM.

Presentment may of course be made either to the maker, drawee, or acceptor or to his lawful agent; or according to the Statute, if the party primarily liable is 'absent or inaccessible to any person found at the place where the presentment is made.'³

In case of such person's death presentment should be made, if it be required (concerning which see the remarks in the preceding section), to his executor or administrator, if one has qualified and his place of business or of residence can by reasonable diligence be found.⁴ If no one has qualified as executor or administrator, or if the executor or administrator cannot be found, demand perhaps should be made upon the kindred who occupy the residence of the maker or acceptor or have possession of his property; but such a state of things would more likely be held to dispense with need of presentment, at least for the time.

The mere fact that the maker or acceptor has become bankrupt will not affect the rule in regard to presentment, for a man does not cease to own or control his property simply because he is not able to pay his debts. Much less does he cease to have friends who may help him, especially where he has been guiltless in his misfortune. But if an assignee of his estate has been appointed, by the voluntary act of the maker or acceptor, or by the law, it is not clear that presentment should not be made upon the assignee, for the estate may have proved solvent; though it appears to be held that presentment must still be made upon the bankrupt.⁵

¹ See *Burke v. McKay*, 2 How. 66.

² N. I. L. § 161, *supra*, p. 125; 1 Parsons, Notes and Bills, 633; Chitty, Bills, 333, 9th Eng. ed.; Bayley, Bills, c. 7, § 2.

³ N. I. L. § 79, 4.

⁴ N. I. L. § 83; *Gower v. Moore*, 25 Maine, 16.

⁵ See *Nicholson v. Gouthit*, 2 H. Black. 609; 3 Rev. Rep. 527; *Barton v. Baker*, 1 Serg. & R. 334 (notice of dishonor).

Where a promissory note is made by one who signs his name as 'agent,' without disclosing a principal, the note, as we have seen, is the 'agent's' own undertaking as if he were principal. Presentment accordingly should be made upon him, or at all events it may properly be made upon him, though the 'agency' be real; indeed, demand may, it seems, be made upon him though he may have ceased to be agent at the time of the maturity of the note.¹ If the name of the principal were given, and the undertaking made his undertaking, demand could, it seems, be made upon either, — upon the agent, provided that he remained such till maturity; and upon the principal, because the promise in reality was his promise. It would not be necessary to make presentment to both, even though the promise were the joint promise of the two, because of the agency.

Where paper is made or accepted by two or more persons jointly, demand must by the better rule be made upon both or all, unless they are partners, or unless some other agency existed between them in respect of payment.² If they are partners, or one of them is agent for the rest, presentment will be sufficient, where no place of payment is specified, if made upon any one of the partners or upon the agent.³ Upon the death of one of the joint makers or acceptors, presentment to the survivors will, it seems, be sufficient; clearly that would be the case where they were partners.

If the makers or acceptors are severally bound, presentment made to any one of them will be sufficient to bind parties conditionally liable, for the promise is the individual promise of each, as much as if the others had not promised. And this is true as well of a 'joint and several' undertaking as of a several

¹ Hall v. Bradbury, 40 Conn. 32.

² Arnold v. Dresser, 8 Allen, 435; Union Bank v. Willis, supra; Bank of Red Oak v. Orvis, 40 Iowa, 332; Willis v. Green, 5 Hill, 232; Gates v. Beecher, 60 N. Y. 518, denying Harris v. Clark, 10 Ohio, 5. See also Greenough v. Smead, 3 Ohio St. 415.

³ Gates v. Beecher, supra; N. I. L. § 84, 'even though there has been a dissolution of the firm.'

one merely; for the meaning of the engagement is that the parties promise in two distinct, not inseparable, ways: they promise jointly and they promise separately; that is, they are bound in either way.¹

¹ It was a mere slip of the court in *Union Bank v. Willis*, 8 Met. 504, at the end, to say that the contract in that case was joint and several; the decision reached required the court to hold the contract joint only.

CHAPTER X.

INDORSER'S CONTRACT CONTINUED: PROCEEDINGS
UPON DISHONOR.

§ 1. PROTEST.

By the law merchant, unwritten and written, the first step necessary after the dishonor of a *foreign* bill of exchange — a step common and by statute permissible, but not necessary, in the case of inland bills, promissory notes, and cheques — is protest.¹ This is a highly characteristic step, taken in ordinary cases only by a public officer called a notary public; though the Statute permits the protesting of bills of exchange by 'any respectable resident of the place where the bill is dishonored,'² while silent in regard to promissory notes.³ A notary public is an officer of international character, or at all events having international (and interstate) functions, and recognized the world over. And it is because the bill of exchange is a foreign instrument that the services of a notary are required, if obtainable.⁴

Protest is manifested by a formal certificate annexed to the bill or a copy of it,⁵ in writing under seal, of a notary, or of some one taking the place of a notary, by which he attests the dishonor of the dishonored paper. The step is wholly distinct and separate from presentment or any of the other steps necessary to fix an indorser's liability, though it is dependent for its validity upon due presentment.

¹ N. I. L. §§ 125, 159. See also § 164. Protest, 'to bear *public* witness, declare solemnly.' '*Pro*, publicly, and *testare*, to bear witness.' Skeat's Etymological Dict.

² N. I. L. § 161.

³ Probably an oversight.

⁴ When the services of a notary may be performed by another, see ante, p. 125.

⁵ N. I. L. § 160.

Neither the law merchant nor statute has prescribed any form of words to be used in the certificate of protest ; but the law merchant, touching foreign bills, does require that certain facts should appear in it, in order to make it valid.¹ These facts are the several ones going to show dishonor ; to wit, due presentment, demand, and refusal, or an equivalent, or a sufficient excuse for omission.² This requires that the certificate should state time and place³ of presentment,⁴ and in principle the person or persons to whom presentment was made.⁵ Thus, in regard to persons, if the bill has been accepted by more than one the certificate should state that presentment was made to all, or should state why it was not, as, for example, that the acceptors, being A and B, were partners, and that presentment was made to A.⁶ It will not suffice for the certificate to recite that 'due presentment' was made ; that would be but inference, where, because the bill is a foreign international instrument, facts should appear.

The rule of the law merchant is thus exacting because by that law the certificate of protest of a foreign bill, if the certificate is in existence and obtainable, is the only evidence of the dishonor of the bill. The drawer, or at least some of the parties secondarily liable, live in another state or

¹ N. I. L. § 160.

² See *Staniback v. Bank of Virginia*, 11 Gratt. 260 ; *People's Bank v. Brooke*, 31 Md. 7 ; *Farmers' Bank v. Allen*, 18 Md. 475 ; *Walmsley v. Acton*, 44 Barb. 312 ; *Musson v. Lake*, 4 How. 262.

³ If the instrument is payable at bank, it should, it is held, show presentment *there* (where the holder stands on the certificate alone) ; it is not enough that it states that the bill was presented to the cashier. *Peabody Co. v. Wilson*, 29 W. Va. 528.

⁴ N. I. L. § 160, 1.

⁵ This is not stated by the Statute, but is perhaps to be inferred from the statement that the protest must 'specify' the demand and answer, if any, 'or the fact that the drawee or acceptor could not be found.' § 157, 4. The rule is plain in point of principle, where the holder rests his case upon the certificate ; the certificate should then plainly make a case of dishonor. But see *Douglas v. Bank*, 97 Tenn. 133, holding that the certificate need not state the persons on whom demand was made if the demand was made at the place designated for payment.

⁶ *Otsego Bank v. Warren*, 18 Barb. 290 ; *Nave v. Richardson*, 36 Mo. 130.

country, presumptively, from that of the drawee, and hence are entitled to know authoritatively that the dishonor has been real, such as to justify the steps by which their liability is fixed and made absolute. The notarial certificate of the protest of a *foreign* bill is treated as a sort of international document, and, it seems, stands or falls by itself; its deficiencies, if there be any, probably cannot be made good by evidence from without, however clear the facts may be, and whether the protest be for non-acceptance or non-payment.¹ On the other hand, being such a document, it is more readily received in the courts than other written instruments. The genuineness of the notary's signature need not be proved; his seal proves that. But evidence would be admitted, of course, that the seal was not genuine, and so that the whole certificate was fraudulent.

Nor indeed are the statements made in the certificate conclusive evidence,² though they ought to be taken as strong evidence, and not so easily overturned as ordinary evidence. And in the case of a foreign bill the certificate is treated, like other written evidence of a transaction, within the general rule concerning the 'best' evidence; if the certificate exists, and can be produced, it must be produced to prove the dishonor; if it does not exist or cannot be produced, other evidence of dishonor is admissible, though proof must be furnished that the bill was in fact protested, or a sufficient excuse shown if it was not. The object of the certificate being merely to furnish evidence of sufficient dishonor, its statements of other facts, if such there be, cannot be received.

The States of the American Union, it should be remembered, are foreign to each other for the purposes of the law under consideration.³

¹ See *Ocean Bank v. Williams*, 102 Mass. 141; *Buckner v. Finley*, 2 Peters, 586; *Orr v. Maginnis*, 7 East, 359. This appears to follow from the fact that the protest, that is, the certificate, is necessary, in the case of a foreign bill, to prove the dishonor of the instrument. The certificate can no doubt be amended by the *notary* before it is offered in evidence; but once it is offered in evidence, the die is cast. Secus, if the instrument be an inland bill, a note, or a cheque.

² *Spence v. Crockett*, 5 Baxt. 576; *Ricketts v. Pendleton*, 14 Md. 320.

³ *Bank of United States v. Daniel*, 12 Peters, 32, 54; *Commercial Bank v. Varnum*, 49 N. Y. 269.

Thus far of foreign bills. Of the protest of inland bills and notes and cheques the unwritten law merchant knows nothing; and hence, so far as the protest of such paper is proper, it must stand on statute.¹ Statute in many States does authorize it.² But statute has not put the protest of paper of the kind on the footing of the protest of foreign bills; it only authorizes or permits the protest. The protest of an inland bill or of a promissory note is not then an act of the high character of the protest of a foreign bill. The certificate is not to be rejected because it does not contain all that would be necessary to show due protest under the law merchant; it is evidence of dishonor as far as it goes, — its deficiencies may be supplied by external evidence.³ Probably it might be laid aside altogether, and the facts relating to dishonor proved as if there had been no protest. At best it ought not to be received to prove anything except the dishonor, unless statute give it greater force, as it generally does.

The act of the notary or other in making the presentment must, as has already been stated, take place on the day of

¹ *City Bank v. Cutter*, 3 Pick. 414; *Union Bank v. Hyde*, 6 Wheat. 572; *Nicholls v. Webb*, 8 Wheat. 326; *Kirtland v. Wanzer*, 2 Duer, 278. 'Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.' N. I. L. § 159. Notes and cheques are not mentioned by the Statute, and hence are left to the unwritten law or to any special legislation touching protest. By the unwritten law merchant accordingly protest of inland bills, notes, and cheques is no evidence of dishonor. *Corbin v. Planters' Bank*, 87 Va. 661.

² Hence, apart from statute the protest of an inland bill or a promissory note is no evidence of any of the facts stated, unless the notary has deceased. *Nicholls v. Webb*, and *Kirtland v. Wanzer*, *supra*; *Carter v. Burley*, 9 N. H. 558. But see *Seymour v. Brainerd*, 66 Vt. 320; *Colms v. Bank of Tennessee*, 4 Baxt. 422. As to the effect of statute making protest of such instruments evidence of what it states, see *Linkhous v. Hale*, 27 Gratt. 669; *Peabody Co. v. Wilson*, 29 W. Va. 528; *Legg v. Vinal*, 165 Mass. 555. The last case holds, amidst some conflict of authority, that the certificate of protest of a promissory note need not state that the place to which notice of dishonor is sent by mail is the indorser's true residence or address; that is, even when the holder stands upon the certificate alone.

³ *Wetherall v. Claggett*, 28 Md. 465; *Seneca Bank v. Neass*, 5 Denio, 329; *Magoun v. Walker*, 49 Maine, 419.

maturity of the paper. The formal certificate of protest, whether of a foreign bill or of other paper, need not, however, be made, and commonly is not made, at the time;¹ it may be made at any subsequent time down to the time of suit.² But if the full certificate is not made out at the time of the dishonor, what is called a 'noting' should then, or at all events before the following day, be made;³ otherwise it seems that a certificate afterwards written out will be invalid.⁴ Noting consists in the making of minutes in brief of the facts to be stated in the certificate. The noting is not the protest; but if the notary should die before writing out the certificate the noting may take its place if it is, or, on explanation by one who understands it becomes, intelligible. So if the certificate should be lost or destroyed without the holder's consent.

If protested, the instrument, at least in the case of a bill of exchange,⁵ must be protested at the place where it was dishonored; except that when a bill drawn payable at the place of business or residence of some one not the drawee has been dishonored by non-acceptance, it is to be protested for non-payment at the place where it is expressed to be payable. No further presentment on the drawee in that case is necessary.⁶ Protest of a bill lost, destroyed, or wrongly detained from the person entitled to it, may be made on a copy or written particulars.⁷

§ 2. NOTICE OF DISHONOR: FORM.

The next and last step to be taken after protest, and where protest is not necessary and is not made, the next and last step after dishonor, is notice of the dishonor. Like presentment, that step is required of all paper in fixing the liability of an indorser; that step or an equivalent or a substitute, unless there be an excuse.⁸ Knowl-

Notice presumptively necessary.

¹ N. I. L. § 162.

² *Bailey v. Dozier*, 6 How. 23; *Dennistown v. Stewart*, 17 How. 606, 607.

³ See same cases.

⁴ *Tassel v. Lewis*, Ld. Raym. 743. See *Leftley v. Mills*, 4 T. R. 170, 174.

⁵ N. I. L. § 163. There appears to be no ground for any distinction.

⁶ Id.

⁷ Id. § 167.

⁸ Id. § 96. In regard to fixing the liability of the drawer of a cheque, see *ante*, pp. 75-79.

edge of dishonor is not enough; the law requires the giving of notice, so as to apprise the indorser whether the holder looks to him for payment.¹

The law merchant has not prescribed any set of words to be used in the notice; here, as in other cases, it is satisfied if its requirements are met in substance. It may be written or oral; ² if written it need not be signed; ³ if written notice is defective, it may be supplemented orally (within time).⁴ The act to be performed is indeed less formal and more simple, and the law merchant is much less exacting, than in the matter of protest; just how much is required to make notice of dishonor good is a question upon which the authorities in certain particulars are in conflict. What is agreed may first be stated.

The law merchant requires that the indorser should be apprised of the paper dishonored;⁵ but it is not exacting in the matter; if the indorser is correctly informed what instrument is dishonored, it matters not that there may be a mistake in the description or reference.⁶ For example: The defendant is indorser of a promissory note, which on due presentment has been dishonored. The note is dated '20th July, 1819,' and payable at the Bank of the United States, Chillicothe, Ohio. A written notice of dishonor is sent to the defendant, in which the note is described at length and stated to be 'dated 20th day of September, 1819'; the holder's name is not stated; in other respects the description is correct, and the notice proper. There is no other note, of which the defendant is indorser, payable at the bank named. The notice is good; the mistake of date not being, under the circumstances, misleading, and the omission of the holder's name being immaterial.⁷ Again: The defendant is indorser of a dishonored promissory note for \$1400. The notice of dishonor in describing the note erroneously states the

¹ *Bank of Old Dominion v. McVeigh*, 29 Gratt. 546; s. c. 26 Gratt. 785, 852; *Juniata Bank v. Hale*, 16 Serg. & R. 157; *Magruder v. Union Bank*, 3 Peters, 87; s. c. 7 Peters, 287.

² N. I. L. § 103.

³ Id. § 102.

⁴ Id.

⁵ *Dodson v. Taylor*, 56 N. J. 11.

⁶ N. I. L. § 102.

⁷ *Mills v. Bank of United States*, 11 Wheat. 431.

sum payable to be \$1457, but otherwise the description is correct, and there is no other note signed by the person named in the notice, and indorsed by the defendant. The notice is good.¹

The law merchant does, however, require that the notice shall apprise the indorser, with reasonable certainty, of the paper in question; a mistake which might well be misleading will be fatal, at least if in fact it did mislead the indorser. Perhaps if he knew what paper was meant, the notice would be good, for although knowledge of dishonor is not notice, notice may perhaps be supplemented and helped by knowledge; the rule that knowledge in such a case is not what the law merchant intends by 'notice' being applicable perhaps only to cases in which no notice at all is given.

We have now reached a difficulty. Does the law merchant require that the notice itself shall, expressly or by certain implication, inform the indorser of dishonor, and of dishonor at maturity; or is it enough that the paper was in point of fact dishonored at maturity, and that notice was given or sent at the proper time? Or again, putting it specifically, so as to raise the concrete question upon which the American courts have divided, is it enough, apart from statute,² for the holder to inform the indorser that the paper indorsed *has not been paid*, assuming that due presentment and protest, where protest is necessary, have been made?

This question has usually, if not always, arisen upon written notice, but it might arise upon oral notice. In a case of oral notice, however, it would be more easy to show that the indorser understood the notice perfectly, if such was the fact, though the language actually used in giving the information might have been scanty, so much so as to be insufficient in a written notice. For in a case of oral notice the parties are face to face, and the statement of the holder to the indorser will be apt to lead to conversation or to conduct making it clear that the

¹ *Bank of Alexandria v. Swann*, 9 Peters, 33.

² See N. I. L. § 103, *infra*.

notice was well understood and sufficient. Such cases then may be dismissed and give place to the difficulties arising from the language of written notice, where the parties are not face to face, and where in consequence the language of the holder may be all the court has to consider.

The course of the English authorities on this point has had so much influence upon our own courts that it is desirable to call special attention to it; that will give us the real explanation of the conflicts in American authority.

To mention cases that have arisen in the English courts only within the present century, the following especially deserve attention: Notice to an indorser in the first of these cases in order of time ran: 'I am desired to apply to you for the payment of £150, due to myself on a draft drawn by Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.' That was held not good notice, on the ground that it was no more than a demand of payment, whereas notice of dishonor was deemed necessary.¹ In a later and very famous case, in the Exchequer Chamber, the predecessor of the present English Court of Appeal, the notice ran: 'A bill of £683 drawn by' A, upon B, 'and bearing your indorsement. has been put into our hands by the assignees of' C, 'with directions to take measures for the recovery thereof, unless immediately paid to' the signers of the notice. The notice was held insufficient;² it being considered necessary that the notice 'in express terms or by necessary implication' should assert the dishonor of the paper. Afterwards, in another case, notice that

¹ *Hartley v. Case*, 4 Barn. & C. 339. The notice in this case would probably be held bad even under the rule of the more recent English cases referred to *infra*. See especially *Furze v. Sharwood*, 2 Q. B. 388, where the decision is declared 'perfectly correct.'

² *Solarte v. Palmer*, 7 Bing. 530; s. c. 1 Bing. N. C. 194. In this case, which has been much discussed, decided as it was in the Exchequer Chamber, the Lord Chief Justice laid down the following rule: 'The notice of dishonor should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount.'

'the bill is this day returned with *charges*' was held sufficient by the Queen's Bench; 'returned with charges' implying dishonor.¹ A few days later the following before the Common Pleas was held insufficient: 'The promissory note . . . became due yesterday, and is returned to me unpaid;' it did not disclose dishonor.² 'Your note . . . became due yesterday, and is returned unpaid . . . with 1s. 6d. for noting' in another and still later case was held sufficient.³

Having regard to the different forms of notice themselves, the decisions in these cases are consistent with each other; and down to and including the last one referred to, they agree in the proposition that the notice should in itself be a notice of *dishonor*. But the court in the last case took exception to the doctrine of the more celebrated one, that it ought to appear in the notice 'in express terms or by necessary implication,' that the paper was dishonored; considering it 'enough if it appear by *reasonable intendment*, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him.'⁴ And later judicial opinion in England appears to conform to that proposition.⁵

That makes the notice a very simple thing; its legal purpose being satisfied if it serve to warn the indorser of the dishonor, in legal sense,⁶ so that he may take steps to secure himself, if

¹ *Grugeon v. Smith*, 6 Ad. & E. 499. See *Hedger v. Steavenson*, 2 Mees. & W. 799; *Furze v. Sharwood*, 2 Q. B. 388.

² *Boulton v. Walsh*, 3 Bing. N. C. 688.

³ *Hedger v. Steavenson*, 2 Mees. & W. 799.

⁴ *Boulton v. Walsh*, *supra*, was overruled in *Robson v. Curlewis*, Car. & M. 378; s. c. 2 Q. B. 421. But just before that decision came *Furze v. Sharwood*, 2 Q. B. 388, in which the court appear to have leaned towards the stricter rule in *Solarte v. Palmer*, saying, however, *inter alia* of the rule in *Boulton v. Walsh*, 'Perhaps it goes no farther than to require that the court must see that, by some words or other, notice of dishonor has been given.'

⁵ *Armstrong v. Christiani*, 5 C. B. 687; *Everard v. Watson*, 1 El. & B. 801; *Paul v. Joel*, 4 Hurl. & N. 355.

⁶ There is dishonor in a certain sense any time after maturity, if the instrument has not been paid; but the dishonor necessary for notice is of course dishonor at maturity. That being the primary, legal sense of the word, notice which in terms states the 'dishonor' of the instrument is good unless facts are shown to invalidate it.

possible, against prior parties. That the notice was justified by due presentment, etc., is, still, a matter to be determined on the evidence at the trial, if suit should be brought, and not an essential feature of the notice itself. Still, the notice must notify of *dishonor* either in terms or by 'reasonable intendment.' The result is this, that instead of the rigid requirement laid down in the Exchequer Chamber of 'necessary implication' of dishonor in the notice, where the fact is not expressly asserted, 'reasonable intendment' of the fact is held sufficient by the later authorities. In other words, the difference is the difference between absolute certainty of meaning and fair natural meaning.

Codification of the English law of bills and notes, which has been effected since these decisions were made, has put the matter thus: Notice of dishonor, the Statute declares, 'may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonored by non-acceptance or non-payment.'¹ The word 'intimate' suggests the words 'reasonable intendment' of the later decisions of the courts, so that those decisions appear to have prevailed.

Turning now to the American cases, we find the Supreme Court of the United States apparently relaxing the requirement even more than have the later English authorities. American cases on the same question. The court expressly says that it is not necessary that notice of dishonor should state that payment was demanded at maturity; that it is so far sufficient if bare non-payment is stated; and that whether presentment was duly made is 'matter of evidence to be established at the trial.'² That is, there need be no assertion or intimation of dishonor in the notice except what is implied in sending notice of non-payment.

But as that doctrine has been debated, it is important to see what in fact the notice stated. The instrument was a promis-

¹ Bills of Exch. Act, § 49, (5). See also Benjamin's Chalmers, Bills, Art. 199. The word 'bill' in the Statute is intended to include notes and cheques.

² Mills v. Bank of United States, 11 Wheat. 431.

sory note payable at a bank in Chillicothe, Ohio. The notice, after describing the instrument, declares that it 'has been protested for non-payment, and the holders thereof look to you.' And the court remarks that the practice in commercial cities is 'not to state in the notice the mode or place of demand, but the mere naked non-payment.' In certain other authorities the decision has been interpreted by these facts, and narrowed accordingly, so as to make it authority for some such proposition only as the following: Notice of non-payment of paper payable at a *bank* in a commercial city, construed with regard to the practice in such places, means notice of dishonor at maturity.

The distinction is thus drawn, which has already been noticed, between paper payable at bank and paper payable generally, and then the case is based more or less upon the alleged practice in large towns; so that, in the absence of such facts notice of non-payment would be insufficient, though prior steps had been duly taken. And accordingly it has been laid down that the dishonor of the paper should appear in the notice expressly or 'by necessary implication or reasonable intendment.' For example: The defendant is indorser of a promissory note, payable at no place stated, which is dishonored at maturity. Notice directly is sent to the defendant in the following language: 'I have a note signed by C E B and indorsed by you for \$700, which is due this day and unpaid; payment is demanded of you.' The notice is deemed bad; the statement that it was unpaid not amounting 'by necessary implication or reasonable intendment' to an intimation that demand had been made or that the note had been in any way dishonored.¹

The decision in this authority appears to come to the same result as that reached in the later English authorities, upon which indeed it is chiefly based. The matter is summed up by the statement of the Chief Justice that 'mere notice of non-payment, which does not express or imply notice of dishonor, is not such notice as will render the indorser liable.' The sufficiency of the notice then is not a mere 'matter of evidence to be established at the trial.'

Notice of dishonor is 'implied' or conveyed by 'reasonable

¹ Gilbert v. Dennis, 3 Met. 495.

intendment,' according to the same authority, by mere statement of non-payment, 'where the paper is in terms, or by usage or special agreement, payable at a bank.' Such statement, it is said, 'is equivalent to an averment that it is dishonored.' In other cases the statement of non-payment alone is not such an equivalent, nor does it imply or convey by reasonable intendment the dishonor of the paper; but the addition of a single word may make the equivalent; adding the word 'protested' would plainly imply dishonor.¹

The explanation of the difference between the case of paper payable at bank and that of paper not payable at bank, in regard to the validity of a notice of 'non-payment' at maturity, lies in a fact heretofore stated. Where paper is payable at bank, and lodged or presented there for payment,² presentment in the ordinary way — by exhibiting the paper — is not required; the maker or acceptor must have provided funds there with which to pay, and if he has not done so it only remains to say that the note has not been paid, to show or to indicate the dishonor. For it may be presumed that the books of the bank have been examined, if necessary, to see whether funds applicable are in the bank.

More recently, however, it has been held in another State, that notice of *dishonor* is not necessary, and that notice of non-payment is enough in any case, whether the paper is payable at bank or not, so long as proper steps in fact have already been taken. For example: The defendant is indorser of a promissory note which does not designate any place of payment. The note is dishonored at maturity, and notice is sent at once by the holder to the defendant, stating that the former holds a 'note indorsed by you and not paid at this date,' and demands payment. That is deemed good notice.³

That doctrine proceeds upon the ground that the purpose of

¹ 1 Parsons, Notes & Bills, 471, citing *Crawford v. Branch Bank*, 7 Ala. 205; *De Wolf v. Murray*, 2 Sandf. 166, and other cases.

² If the instrument is not lodged in or presented for payment at the bank at which it is payable, of course there is no presentment (*ante*, p. 108), and hence there can be no dishonor.

³ *Cromer v. Platt*, 37 Mich. 132, *Graves, J.*, *dis.*

notice of dishonor is simply to warn the indorser that he must be prepared to pay. If, according to such doctrine, the indorser has doubts whether the warning given is good, let him inquire; and doubts he may have as well where the steps are detailed in the notice as where they are not; he is neither better nor worse off by bare warning of non-payment, so far as the real facts in regard to the steps are concerned. But the weight of authority appears to be against such a view of the matter, and it must on the whole be said that the notice should in itself, or in the circumstances attending it, be a notice of dishonor.¹

Authority has sometimes gone still further, and required the notice to show or intimate not only the dishonor of the paper, but dishonor of it at maturity. For example: The defendant is indorser of a promissory note, payable at no stated place, which is dishonored at maturity. The holder directly notifies the defendant in writing, stating that the note has been 'this day presented for payment' without avail, there being nothing to show that 'this day' was the day of maturity. The notice is deemed not good.² But that may be doubted.

The Statute declares the notice sufficient if it '*indicate that*' the instrument 'has been dishonored by non-acceptance or non-payment.'³

The Statute.

Further, the notice must, generally speaking, apprise the indorser that the holder looks to him for payment. All the authorities agree in that statement as a general proposition;⁴ but there has been some question of the meaning of the rule. Does the rule mean that there should be an averment in the notice that the holder looks to the indorser for payment? But implication may be as plain as asser-

¹ See *Clark v. Eldridge*, 13 Met. 96; *Townsend v. Lorain Bank*, 2 Ohio St. 345, 355; *Ransom v. Mack*, 2 Hill, 587; *Dole v. Gold*, 5 Barb. 490; *Arnold v. Kinloch*, 50 Barb. 44; *Armstrong v. Thruston*, 11 Md. 148, 157; *Lockwood v. Crawford*, 18 Conn. 361; *Page v. Gilbert*, 60 Maine, 485.

² *Wynn v. Alden*, 4 Denio, 165. See also *Townsend v. Lorain Bank*, 2 Ohio St. 345; *Etting v. Schuylkill Bank*, 2 Barr, 355; *Routh v. Robertson*, 11 Smedes & M. 382. But see *Crocker v. Gatchell*, 23 Maine, 392; *Ontario Bank v. Petrie*, 3 Wend. 456, overruled in *Ransom v. Mack*, 2 Hill, 587, 595.

³ N. I. L. § 103.

⁴ See § 3, *infra*.

tion, and beyond doubt that is so in every case where the holder sends notice of dishonor; the sending or giving of the notice has no meaning in such a case unless it means that the holder looks to the party notified for payment. And so the courts do not require any such statement, though it is common to make one; nor perhaps is such statement necessary in notice by one indorser, though not the holder, to another. It is enough certainly that the notice proceeds from the holder or from his agent or from a notary employed by either.¹

§ 3. NOTICE, BY WHOM.

Notice of dishonor should be given (1) by the holder or by his authorized agent, or (2) by an indorser legally bound to pay. It cannot be given, so as to have legal effect, by any other person; except, of course, on the death of the holder, by his personal representative. This is certainly the unwritten law merchant; and it probably is the written law also, though the written law uses the word 'may.' The Statute declares that notice *may* be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right of reimbursement from the party to whom the notice is given.² But 'may' no doubt means must, and on 'behalf of,' an authorized agent.

A stranger then, acting without due authority, cannot give valid notice of dishonor; and the reason makes the rule sensible and just, — an unauthorized stranger cannot apprise the indorser of what he is entitled to know, to wit, that the holder (or other party) will look to him for payment.³

¹ Bank of United States v. Carneal, 2 Peters, 543; Chanoine v. Fowler, 3 Wend. 173; Furze v. Sharwood, 2 Q. B. 388. In the latter case Lord Denman, C. J., said: 'Where notice has been given by another party [i. e. an indorser] than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment or a statement that it will be required of the party addressed; but in no case has the absence of such information been held to vitiate a notice in other respects complete, and which has come directly from the holder.'

² N. I. L. § 97.

³ Cases in note 1, supra.

For the same reason it was at one time held that an indorser who was not the holder could not give valid notice, in his own behalf; he could not inform the party notified that the holder would look to him for payment, unless he was authorized by the holder to act for him; and in that case it would not be the indorser's notice. But the contrary rule, arising no doubt from custom, and therefore justifiable, now prevails. For example: The defendant is drawer of a bill of exchange, of which the plaintiff is an indorser, having indorsed it in favor of W who had discounted and so purchased the bill. On discounting the bill W left it with the plaintiff's clerk, with instructions to him to obtain payment or give notice of dishonor. The clerk does give such notice to the defendant at the proper time, but he gives it, not in the name of W but in the name of the plaintiff.¹ The notice is good.²

But though an indorser whose liability has been fixed may give notice for his own benefit, to avail him in case he should afterwards be compelled to pay or should pay without suit — for an indorser loses none of his rights by so paying after his liability has been fixed; — can the indorser give notice which may avail the *holder* or any intermediate party? Doubt has existed on this point also, because an indorser as such is not an agent for the holder or for the next or any later indorser.

Clearly the mere fact that an indorser has given notice to a prior indorser in due time will not of itself avail the holder. But if the notifying indorser has authority from the holder or other to give the notice, his act will be the *inurement of notice*. act of the holder; or if, not having authority from the holder or other, his own liability as indorser has been duly fixed, notice given by him, it is now understood, will avail the holder or intermediate indorser by what is well termed *inurement*.³ It

¹ The case therefore stands just as if the plaintiff indorser himself gave the notice.

² *Chapman v. Keane*, 3 Ad. & E. 193, overruling *Tindal v. Brown*, 1 T. R. 167; s. c. 2 T. R. 186, in which it had been held that notice should come from the holder or his agent, so as to apprise the party notified that he would be looked to for payment.

³ N. I. L. § 100: 'Where notice is given by or on behalf of a party entitled

is necessary, however, that the liability of the notifying indorser should have been duly fixed (unless by reason of waiver it was already absolute); otherwise the indorser, being under no liability, is a mere stranger. For example: The defendant is indorser of a bill of exchange, subsequently indorsed by A to the plaintiff. The bill is dishonored at maturity, and A immediately gives notice to the defendant. The plaintiff has not given notice at all, and has not authorized A to give notice for him. The defendant is not liable; the notice by A not inuring to the plaintiff's benefit because A's liability has not been fixed.¹

Now and then a case appears to give sanction to a doctrine that the acceptor of a bill, and, by parity of reasoning, the maker of a note, may give notice available for the holder.² But that, so far as it is to be accepted, can only be explained on the ground that the acceptor or maker was the authorized agent of the holder in the matter; otherwise the doctrine is unsound.³ There must be an agency, if the notice is not given by an indorser, at the time of giving the notice, and in the act of giving it.⁴

to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.' See also §§ 99, 100, of the Statute, in regard to notice by the holder inuring to others. 'The plaintiff insists that the notice given by the bank shall inure to his benefit. If the notice had been in time and valid, it would by law have inured to his benefit,' etc. Reese, J., in *Simpson v. Turney*, 5 Humph. 419. It should be observed that inurement is not agency.

¹ See *Lysaght v. Bryant*, 9 C. B. 46, the converse case, the notifying indorser having been duly notified by the holder and plaintiff. 'It seems from the cases that the holder of a bill may avail himself of a notice given in due time by a prior indorser, *provided* he himself is in a condition to sue the party by whom the notice was given.' *Id.*, Cresswell, J. See also *Harrison v. Ruscoe*, 15 Mees. & W. 231.

² *Rosher v. Kieran*, 4 Camp. 87; *Shaw v. Croft*, Chitty, Bills, 494; *Douglas v. Bank*, 97 Tenn. 133, that notice may be given by any party.

³ Bayley, Bills, 254, 5th ed.; Thompson, Bills, 359, Wilson's ed. See *Sebree Bank v. Moreland*, 96 Ky. 151.

⁴ See *New York Co. v. Selma Sav. Bank*, 51 Ala. 305.

§ 4. NOTICE, TO WHOM.

Notice may be sent to the indorser or to his authorized agent.¹ If two or more have indorsed the paper jointly, notice must be sent to each of them, if by due diligence that can be done;² unless there should be a relation of agency between them, in which case notice to the one who is agent will be sufficient to bind all.³ If there is no agency, notice to part of the number would not bind even them, since they are liable only with the rest.⁴ If the joint indorsers are partners, notice to one will suffice, as each partner represents the firm.⁵

In the event of the death of an indorser known to the person to give notice, notice should be given to his personal representative if there be such, and the representative can with reasonable diligence be found.⁶ If there be more than one representative, notice to one of them is notice to all.⁷ But even though there should be no personal representative of the deceased indorser, it is still the duty of the holder to exercise reasonable diligence towards informing those interested in his estate of the dishonor of the paper.⁸ It has accordingly been held that if notice is sent to the last place of residence or of business of the indorser, that is enough, *prima facie*, to fix the liability of his estate, since it may reasonably be assumed that the notice will reach those who are chiefly interested.⁹ So

¹ N. I. L. § 104.

² *Id.* § 107; *State Bank v. Slaughter*, 7 Blackf. 133; *Beals v. Peck*, 12 Barb. 245; *Willis v. Green*, 5 Hill, 232; *Miser v. Trovinger*, 7 Ohio St. 281.

³ N. I. L. §§ 106, 107.

⁴ *Jarnagin v. Stratton*, 95 Tenn. 619, 621, treating it so by the weight of authority. The joint contract doctrine of the common law has been thrust upon the law merchant; but there is no escape from the conclusion. *Ante*, p. 5.

⁵ N. I. L. § 106 ('even though there has been a dissolution'); *Gowan v. Jackson*, 20 Johns. 176; *Bouldin v. Page*, 24 Mo. 594.

⁶ N. I. L. § 105; *Dodson v. Taylor*, 56 N. J. 11.

⁷ *Beals v. Peck*, 12 Barb. 245.

⁸ *Goodnow v. Warren*, 122 Mass. 79. It seems that delay for the appointment of a personal representative of the deceased indorser would not be justifiable. *Deining v. Miller*, 7 App. Div. N. Y. S. C. 409.

⁹ *Id.*; *Dodson v. Taylor*, 56 N. J. 11; N. I. L. § 105.

too notice may be sent to one named as executor in the will of an indorser, though the person named has not qualified ; for the fact that the indorser has named him as his executor is enough to indicate that he will take an interest in the estate, even though he should decline the office, and inform those directly concerned.¹ But it would not satisfy the law to send notice to a person *afterwards* appointed administrator, not being a person to whom the estate would pass.²

Notice to the personal representative should, it seems, be sent addressed to him by name, if his name can be ascertained by reasonable diligence, and not 'to the executor' or 'administrator' or 'personal representatives' of the indorser ; though notice so addressed will in any case be good if received in due time.³ On the death of a partner, in the case of partnership indorsement, notice should be given to the survivor,⁴ and also perhaps to the personal representative of the deceased.⁵

If a party secondarily liable has been adjudged a bankrupt or an insolvent, or has made an assignment for his creditors, notice may be given either to the party himself or to his trustee or assignee.⁶

§ 5. NOTICE, How.

The law merchant requires that the indorser shall be notified of the dishonor with reasonable despatch ; and hence it cannot be, and is not indifferent to, methods of giving notice. That is to say, the presumably more direct and expeditious method must be adopted, unless it can be shown that the notice reached the indorser, notwithstanding the method

¹ Shoenberger v. Lancaster Sav. Inst., 28 Penn. St. 459.

² Goodnow v. Warren, 122 Mass. 79 ; Mathewson v. Strafford Bank, 45 N. H. 104.

³ Smalley v. Wright, 40 N. J. 471 ; Linderman v. Guldin, 34 Penn. St. 54.

⁴ Slocomb v. De Lizardi, 21 La. An. 355.

⁵ Cocke v. Bank of Tennessee, 6 Hump. 51. But see Dabney v. Stidger, 4 Smedes & M. 749. See Hubbard v. Matthews, 54 N. Y. 43. But see N. I. L. § 105 : 'Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.' Does *this* include dissolution by the death of a partner ?

⁶ N. I. L. § 108.

used, as soon as it would have done had the method preferred by law been used. And the law merchant has defined, with some degree of nicety, if not of over-nicety, the methods preferred.

Before postal communications had become as frequent and as perfect as they now are, the courts had declared that where the party to be notified resided or did business in the same town in which the notifying party resided or did business, the method to be preferred was by 'personal' act, which means notifying the defendant to his face or leaving written notice for him at his place of business or of residence.¹ The mail was supposed to be not so expeditious; and hence notice sent through the post-office, in such a case, was deemed insufficient unless it was in fact received, and received no later than the latest day on which it would have been good if orally given.²

And so, generally speaking, the unwritten law stands at this day. For example: The defendant is indorser and the plaintiff holder of a promissory note, the note being in the hands of a bank for collection at the place of residence of the defendant. Upon the note there is a memorandum, written by the defendant, in these words: 'Third indorser,' the defendant, 'lives at V,' the place just referred to. The collecting bank, in due time, by a notary public, puts a letter in the post-office at V, containing notice of the dishonor of the paper. There is no evidence that the letter is received, nor is there any evidence of usage at V to mail notices of dishonor in such cases. The defendant is not liable, the memorandum on the note not being an authorization of notice by the mail.³

To that rule, which in more recent times has often been regretted, three exceptions at least have come to be made in the unwritten law, one being perhaps contemporaneous with the rule itself: to wit, (1) If the parties live or do business in a place in which letters are regularly and daily delivered by carriers of the

¹ *Brown v. Bank of Abingdon*, 85 Va. 95.

² Notice by telegraph would be good, of course, if *delivered* in season. *Fielding v. Corry*, 1898, 1 Q. B. 268, 271.

³ *Bowling v. Harrison*, 6 How. 248.

government, or perhaps by private carriers, the notice may be sent through the mail. (2) An indorser who, residing in a different town from that of the holder, has himself received due notice through the mail, may notify a prior indorser by the mail, though that indorser resides in the same town in which he, the notifying indorser, resides, and though the practice of delivering letters does not prevail there. (3) Where the parties live in different villages or perhaps districts of one town, the mail may be used for sending notice.

For example (hypothetical): The defendant is indorser and the plaintiff holder of a dishonored promissory note, both parties living in Chicago. Notice of the dishonor may be given by mail. Again: The defendant is indorser of a bill of exchange payable in Philadelphia to A or order, who lives in Providence; A indorses the bill to a bank in Providence; that bank indorses it over to another bank in New York, which latter bank indorses it for collection to a bank in Philadelphia.* The bill is dishonored, and the collecting bank causes notices to be made out for all the parties, and sends them seasonably to the bank in New York; that bank sends notice seasonably to the bank in Providence, inclosing a notice for the defendant; and the bank in Providence now places this last-named notice in the post-office properly addressed. The defendant's liability under the circumstances is duly fixed.¹ Again: The defendant is indorser and the plaintiff holder of a promissory note which has been dishonored. The parties both reside in the town of S, but the defendant resides in another part of the town from the plaintiff, in a distinct village, C, where he usually receives his mail. The plaintiff mails notice of dishonor to the defendant seasonably, addressed to him at C. The defendant's liability is duly fixed.²

When, indeed, notice through the mail is proper, the mere mailing the notice, in a post-office or in a letter box under control of the post-office,³ if seasonable, is enough to fix the lia-

¹ *Eagle Bank v. Hathaway*, 5 Met. 212.

² *Shaylor v. Mix*, 4 Allen, 351. The defendant, however, received the notice.

³ N. I. L. § 113.

bility of the indorser; the law merchant does not expect the holder to see that the post-master delivers it or that the indorser has received it in any other way. For example: The defendant is indorser and the plaintiff holder of a promissory note, the former living in Boston, the latter in Philadelphia. The note is payable in Philadelphia, is dishonored, and protested by a notary. The notary thereupon mails in Philadelphia a letter containing the notice to the defendant in Boston. It does not appear that the defendant has ever received the letter. The defendant's liability is duly fixed.¹

The Statute appears to treat notice by the mail as proper in all cases, as it should be in the certainty and despatch of the post-office in our day.²

Indeed, judicial authority, proceeding more or less upon custom in cities, has gone still further and treated notice by mail, when proper at all, as good against all parties to whom notices may be inclosed in a single letter addressed to a later indorser. So to do has been deemed exercising due diligence, and hence whether the letter or the notices are ever received is immaterial. For example: The defendant is third indorser and the plaintiffs are holders of a promissory note. Before maturity of the note the plaintiffs send it for collection to their agent, a bank in Boston, which bank indorses it and sends it to its own agent, a bank in New York. At maturity payment is demanded and refused, and the note duly protested. Notices of dishonor are thereupon addressed by the notary to each of the indorsers and sent in a letter to the bank in Boston, duly addressed and mailed in the post-office in New York. This letter, with inclosures, is lost and never received by the bank or by the defendant. The liability of the defendant is deemed to have been duly fixed, due diligence having been exercised according to the usage and practice of merchants and bankers, and it being immaterial that the last indorser held the note for collection only.³

¹ *Munn v. Baldwin*, 6 Mass. 316. See also *Shelton v. Carpenter*, 60 Ala. 201; *Jones v. Wardell*, 6 Watts & S. 399.

² See N. I. L. §§ 110, 111.

³ *Wamesit Bank v. Buttrick*, 11 Gray, 387. But see *Van Brunt v.*

An agent, in giving notice, is treated as if he were principal; hence whether notice to be given by such person should be by Agent treated 'personal' act or by mail is to be determined by as holder. *his* situation towards the indorser, not by the situation of the principal towards the indorser.¹

A private messenger may be employed in any case to carry the notice, even in those cases in which the mail is the preferred Use of mes- means. But where the employment of a messenger senger. is not presumptively the method to be adopted (as it would be in a village in which both parties resided, there being no delivery there by carriers, and as it would not be where they reside in different towns), the notice by messenger will be good only in case it is delivered to the indorser personally, or at his place of business or of residence, not later than the latest day on which it would reach its destination in due course of the mail.

Notice may be sent to the several indorsers in succession. For example: A promissory note is indorsed by five persons Notice in successively. The holder may notify the fifth succession. indorser; the fifth indorser may then notify the fourth; the fourth may then notify the third; and so on back to the first. Each notice so given, if seasonable, will fix liability.²

Notice by what is aptly termed inurement has already been referred to in the section relating to the persons who may give or send notice.³ The subject belongs equally to the Notice by inurement. present section, and it may accordingly be stated here that one of the methods of notice is by inurement; and that may be explained by the following example: The defendant is first of three indorsers of a promissory note of which the

Vaughn, 47 Iowa, 145, where the notice is treated as good *provided* the party to whom the notices are directed himself sends them on.

¹ Manchester Bank v. Fellows, 28 N. H. 302; Bowling v. Harrison, 6 How. 248.

² Shelburne Falls Bank v. Townsley, 107 Mass. 444; s. c. 102 Mass. 177. When each notice is seasonable, see *infra*, § 6.

³ Ante, p. 143.

plaintiff is holder. The note being dishonored at maturity, the holder gives due notice to the third indorser, and the third indorser gives due notice to defendant (or to the second indorser, who duly notifies the defendant). The plaintiff is entitled to recover, the intermediate notice (or notices) given inuring to his benefit.¹

§ 6. NOTICE, WHEN.

Notice of dishonor may be given by the holder either on the day of the dishonor, being the day of maturity,² or on the first following secular day; and it must be given on one of those two days unless a sufficient reason is shown for omitting to do so,³ or the indorser will be discharged. There is, however, no case in which, by the law merchant, notice must be given on the day of dishonor, however easily it might be done, and whatever the consequences of not doing it. For example: The defendant is indorser and the plaintiff holder of a promissory note payable in Alexandria, Virginia, which matures August 25. On that day it is dishonored. On the next day notice is sent to the defendant by mail in Washington, where he resides. The notice is seasonable; the law merchant requiring, not the utmost, but only ordinary, reasonable diligence.⁴

It should be remarked that, although what the law merchant requires in the matter of fixing the liability of the indorser, whether in respect of presentment, protest, or notice, is only in terms 'reasonable diligence'; still what constitutes reasonable diligence is often defined, presumptively but only presumptively, within narrow limits. And the point under consideration is an example. Reasonable diligence only is required;⁵ but that is

¹ See *Simpson v. Turney*, 5 Humph. 419, where, however, the intermediate notice was too late.

² N. I. L. § 109; *King v. Crowell*, 61 Maine, 244; *Howard v. Ives*, 1 Hill, 263.

³ *Lindo v. Unsworth*, 2 Camp. 602; 12 Rev. Rep. 750, Jewish festival held by Lord Ellenborough ground for *delay*.

⁴ *Bank of Alexandria v. Swann*, 9 Peters, 33. See *Smith v. Poillon*, 87 N. Y. 590, 597.

⁵ *Farnsworth v. Mullen*, 164 Mass. 112.

interpreted by the law to mean, that presumptively notice should be given on one of the two days mentioned in the rule.

If the day following maturity and dishonor should be a non-secular day, or if, where the mail may be used there is no departure of the mail on the next day after maturity, the holder, supposing that he resides in a *different town* from that of the party to be notified, may wait in the one case until the first secular day, in the other, until the next departure of the mail after the day of maturity, however long that may be.¹ It matters not that there was a regular departure of the mail on the day of maturity and dishonor. It will be observed that, while the occurrence of non-secular days cuts off grace, such occurrence *adds* to the time for giving notice.

If the person giving and the person to receive notice reside in the *same town*, notice of dishonor must, if given at the place of business of the party to be notified, be given before the close of business hours on the day following dishonor or of receiving notice. If it is given at the party's residence, it must be given before the usual hours of rest on such following day. If sent by mail, it must be deposited in the post-office soon enough to reach the party in usual course on such following day.²

The length of time allowed to the holder for giving notice is not varied at all by the circumstance that there may be several indorsements upon the paper, and that he may wish to notify some other indorser than the last one. The holder may himself notify any indorser he will, notifying or not notifying others; but he has no more time for giving notice to the first or an intermediate indorser than to the

¹ N. I. L. § 111: 'Where the person giving and the person to receive notice reside in different places, the notice . . . if sent by mail . . . must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail if it had been deposited in the post-office within the time specified in the last' sentence.

² N. I. L. § 110, 3. This of course supposes that there is a mail delivery in the place.

last.¹ It does not matter that as much or more time would be taken if notices were sent successively back from the last to the defendant indorser. For example (hypothetical): The defendant is first indorser and the plaintiff holder of a promissory note upon which there are five successive indorsements. Two days after the maturity and dishonor of the note, the plaintiff notifies the defendant, though the day after maturity was a secular day, with departure of mail during business hours. The notice is not seasonable.²

There is, however, some doubt concerning the meaning of the rule that the holder has until the day after maturity, or other day according to circumstances. The rule clearly does not mean that notice must be posted, where the mail may be used, on that day at all events. One day for giving notice: meaning.

Not to speak of excuses, of which later, the only mail on the day in question may depart at an unseasonable hour in the morning for business; in such a case the law treats that day as if it were a non-secular day, so far as the sending of notice is concerned.³ But supposing that there is a departure of the mail after business hours have opened, on the day after dishonor, must the holder deposit his notice in the post-office in time for that mail?

It has been said that the holder has an entire day after the dishonor for giving notice; and that has sometimes been interpreted to mean that the holder has until the end of that day, so that the notice need not leave until the departure of the mail a day later. For example: A promissory note is due January 2. Demand is made, and payment refused on that day. Notice of dishonor is deposited in the post-office for the defendant at 10 o'clock at night, January 3; there have been departures of the mail since business hours of the morning to the place of the de-

¹ See N. I. L. §§ 110, 111: 'Where the person giving and the person to receive notice,' etc.; that is, whoever the person to be notified is.

² See *Simpson v. Turney*, 5 Humph. 419.

³ See *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Cases*, 179; 3 Kent, 106, note. 'Notice put into the post-office on the next day at any time of the day, so as to be ready to go by the first mail that goes *thereafter*, is due notice, though it may not be mailed in season to go by the mail of the day next after the day of the default.'

fendant's residence, but the last mail has already departed, and the notice cannot go before January 4. The mailing of the notice is deemed seasonable.¹

That doctrine, though having the support of a great judge, has been seriously questioned, and indeed denied by judicial authority to be a correct statement of the law merchant; the rule, so far as there is a rule so expressed, that the holder has an 'entire day' for giving notice, being considered only a general, and not an exact statement of the law. The true rule is accordingly deemed to be that the holder ought to avail himself at latest of some departure of the mail after the opening of business hours, if there be such mail, on the day following the dishonor.² For example: The defendant, residing in Salem, Ohio, is indorser of a bill of exchange held by the plaintiffs, residing in Pittsburgh, Pennsylvania. The bill is dishonored and protested July 27. There is one, and only one, daily departure of the mail from Pittsburgh to Salem: to wit, at 9.10 o'clock A. M., which is after reasonable business hours of the day. Notice to the defendant is deposited in the mail on July 28, but too late for the mail of that day. The notice is deemed not seasonable; due diligence has not been exercised.³

The rule declared in the case given in this example has this in its favor, that it was laid down upon mature consideration and upon a review of the authorities. A question which before had been but slightly considered has now been answered by deliberate judicial authority; and the rule is accordingly to be taken, it seems, in view of the absence of settled custom and the consequent doubt, as the better declaration of the law merchant.

Reasonable diligence, narrowly defined in certain cases, but not in others, is after all, as we have seen, the requirement in all cases.⁴ Accordingly the point of beginning, in reckoning the time for giving notice, is not the day after maturity, but the day after that on which the holder, upon

¹ *Lawson v. Farmers' Bank*, referring to *Kent*, ut supra.

² *Peabody Co. v. Wilson*, 29 W. Va. 528.

³ *Lawson v. Farmers' Bank*, supra.

⁴ *Bank of Utica v. Bender*, 21 Wend. 643; *Cases*, 191; *Gladwell v. Turner*, L. R. 5 Ex. 59.

exercising reasonable diligence, is in a position to give notice.¹ For example : The defendant is drawer and the plaintiff holder of a bill of exchange dishonored at maturity. On the morning after the dishonor of the bill, the holder, not knowing where the defendant lives, applies to one of the indorsers at his house for information, but not finding him at home, calls again at 5.30 in the afternoon, and now obtaining from him the defendant's address, posts notice the same evening after six o'clock. The defendant's liability is fixed, though he does not receive the notice on the day on which it was posted as he would have done had the notice been posted before six o'clock.²

It would have made no difference in the example had it appeared that the whole of the day and evening had been consumed, and all of the next day or week, in reasonable endeavor to find the address of the defendant ; time reasonably consumed in finding the defendant or his address is to be deducted from the account.³ Nor, as has already been seen, would it have made any difference had the notice never been received, the mail being a proper vehicle for conveying it.

Thus far of the time of notice when given by the holder. The time allowed an *indorser* is, generally speaking, the same as would be allowed if he were holder.⁴ He may give notice on the day on which he received notice; Time allowed indorser. he must give notice either on that day, or on the first succeeding secular day on which there is a departure of the mail to the indorser's place of residence where the mail may be used, unless on the first succeeding secular day the only mail goes out before seasonable business hours in the morning, in which case the indorser, like the holder, has till the next mail. And, like the holder, he has no more time for giving notice to a remote than to the last indorser.

There is one case in which, it seems, an indorser may have

¹ Gladwell v. Turner, *supra*.

² Id.

³ Fugitt v. Nixon, 44 Mo. 295 ; Manchester Bank v. Fellows, 28 N. H. 302.

⁴ N. I. L. § 114 : 'Where a person receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.'

more time for giving notice than a holder. Notice of dishonor might be received by an indorser on Sunday or some other non-secular day; but in such a case the indorser would not be bound to regard it until the first secular day following, so that the receiving of the notice could be reckoned, at the indorser's election, as from such secular day. Accordingly, the indorser would have that day and the next, even to the next secular day, if the morrow after the day from which the reckoning is begun should be non-secular, and until a departure of the mail, as already explained. For example (hypothetical): The defendant is first, and the plaintiff second, indorser of a promissory note. Due notice of dishonor has been sent to the plaintiff. The notice is received on Sunday, July 3. The following day being a holiday, the plaintiff treats the 5th of July as if it were the day on which he received the notice, and mails notice to the defendant on the 6th of July (or if there is no departure of the mail to the destination of the notice on the 6th, or if the only departure is before reasonable business of that day, then so as to go by the first mail afterwards). The notice is (probably) seasonable.¹

Notice sent on non-secular day. Notice may, however, be sent, whether by the holder or by an indorser, on Sunday or other non-secular day, since notice is merely warning.²

An agent for collection is treated as holder for the purpose of giving notice of dishonor, and his principal, if he indorsed the paper, is accordingly treated as an ordinary indorser; that is, the case is regarded as if it were not a case of agency. In other words, the real holder and owner, if an indorser, stands upon the footing of an indorser in regard to the question of time in giving notice of dishonor. Thus the agent has the same time for notifying his principal which any other holder would have; and the principal has the same time he would have if the agent had been owner of the paper.³

¹ See *Wright v. Shawcross*, 2 Barn. & Ald. 501, note; *Bray v. Hadwen*, 5 Maule & S. 68; *Deblieux v. Bullard*, 1 Rob. (La.) 66.

² *Deblieux v. Bullard*, *supra*.

³ N. I. L. § 101; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Cases*, 179; *Bank of United States v. Davis*, 2 Hill, 452; *Church v. Barlow*, 9 Pick. 547;

An instrument may have been indorsed after maturity, and serious question has arisen concerning time of notice in such a case. It has sometimes been considered that the ^{Paper indorsed} rules pertaining to indorsement of paper before ^{after maturity.} maturity should not apply, in their strictness, if at all, to such a case; and accordingly notice of dishonor as late as two months after the dishonor, on the special demand now required,¹ has been deemed within reasonable time.² It has even been stated that notice is altogether dispensed with in such a case.³ But the better view appears to be that the rules of ordinary indorsement apply. Indorsers of paper payable on its face on demand are entitled to notice in all respects as in other cases; and why the rule should be otherwise of paper indorsed after maturity, which now is in law payable on demand, it would be difficult to explain.⁴

§ 7. NOTICE, WHERE.

The question where notice is to be given or sent has been indirectly answered already, in part. We have seen that where the holder and the indorser reside in the same town ^{Residence of} the notice should be given to the indorser personally ^{parties.} or left at his place of business or of residence, and that when they live in different places it should be sent to the indorser's address as far as ascertainable by reasonable diligence; unless the party to be notified has added an address to his signature, in

Crocker v. Getchell, 23 Maine, 392; *Manchester Bank v. Fellows*, 28 N. H. 302; *Bray v. Hadwen*, 5 Maule & S. 68; *Prideaux v. Criddle*, L. R. 4 Q. B. 455.

¹ The paper having been indorsed after maturity, a new contract in regard to presentment arises, to wit, that the undertaking of the maker or acceptor is to pay on demand. See ante, p. 115.

² *Van Hoesen v. Van Alstyne*, 3 Wend. 75. See also *McKinney v. Crawford*, 8 Serg. & R. 351; *Gray v. Bell*, 3 Rich. 71; *Chadwick v. Jeffers*, 1 Rich. 397.

³ *Gray v. Bell*, supra, O'Neill, J.

⁴ See *Landon v. Bryant*, 69 Vt. 203; *Bassenhorst v. Wilby*, 45 Ohio St. 333; *Rockwood v. Crawford*, 18 Conn. 361; *Bishop v. Dexter*, 2 Conn. 419; *Berry v. Robinson*, 9 Johns. 121; *Course v. Shackelford*, 2 Nott & M. 283; *Pool v. Tolleson*, 1 McCord, 199; *Ecfert v. Des Coudres*, 1 Mill, 69.

which case notice must be sent accordingly.¹ That goes far towards answering the whole question now raised. The notice should be sent where it will be most likely to be received.²

Notice may, however, be given to the indorser personally anywhere, wherever the holder or notifying indorser may happen to find him, so far as place is concerned ; it may be given to him in his house or counting room, in the cars, or on the street, so long as it is good in other respects.³ And that because the notice is mere warning, and not intended or expected to be followed then and there by payment, as is presentment for payment.

It may be that the indorser has post-office addresses in different towns, or it may be that there are several post-offices within the same town at each of which the indorser is accustomed to receive his mail. In such a case, if the party has not given his address to the notifying party, a letter containing the notice may be addressed to the indorser at the post-office nearest his residence, or at the post-office at which he usually receives his mail,⁴ or, it seems, where the facts are not known to the notifying party, to the town without naming any particular post-office ; and the proper deposit of the letter in the mail, whether at the post-office or in boxes placed for receiving mail, will itself be notice. Such act would be exercising reasonable diligence, and what may become of the letter will be immaterial.⁵

Where there are several post-offices in the town of the indorser, notice by letter addressed to the indorser at the town generally appears, as has just been said, to be sufficient, unless the indorser has been accustomed to receive his letters at one of the

¹ N. I. L. § 115.

² *American Bank v. Junk*, 94 Tenn. 624 ; *Bank of America v. Shaw*, 142 Mass. 290 ; *Casco Bank v. Shaw*, 79 Maine, 376.

³ N. I. L. § 115 : ' Where notice is actually received by the party within the time specified in this Act, it will be sufficient though not sent in accordance with the requirements of this section.' See *Hyslop v. Jones*, 3 McLean, 96.

⁴ N. I. L. § 115, 1.

⁵ See *Roberts v. Taft*, 120 Mass. 169.

offices in particular, and to have his letters addressed to him there. In other words, the holder makes out a presumptive case, so far, by proving that notice was sent to the indorser in a letter by mail addressed to the town generally. But that presumptive case may be met by the indorser by showing that there were several post-offices in the town to the knowledge of the notifying party, that the indorser usually received his letters at one office only, and that the fact might have been learned by reasonable inquiry. Without such evidence it might still be true that the indorser received his mail at any of the post-offices.¹ If, however, the letter was in fact received in due time, it would make no difference that there may have been a mistake in the address.²

The post-office address of the defendant is still a matter of first importance; that rather than the precise locality of his residence. And hence where the indorser's address is known to the notifying party, and the latter sends notice addressed to his place of residence, that being in another town, he must see to it, it seems, that the indorser receives the notice and receives it in due time. Clearly where an indorser receives his mail usually in the town of his residence, but sometimes in another town, notice should be sent to the post-office of his town. For example: The defendant is indorser and the plaintiff holder of a dishonored promissory note; the two living in different towns. The defendant sometimes receives his letters at the post-office of the town in which the plaintiff resides, but usually at the post-office of his own town. The plaintiff drops a letter in his own post-office addressed to the defendant, which is not received in due time. The defendant is discharged.³

Perhaps the rule would be different if the plaintiff did not know that the defendant lived in another town from the one at which the plaintiff knew that he received letters. At all events notice at the plaintiff's post-office would be good if the plaintiff, in mailing it there, acted upon information properly sought and

¹ *Roberts v. Taft*, supra; *Morton v. Westcott*, 8 Cush. 425; *Saco Bank v. Sanborn*, 63 Maine, 340; *Downer v. Remer*, 21 Wend. 10.

² *Roberts v. Taft*, supra.

³ *Shelburne Falls Bank v. Townsley*, 107 Mass. 444.

obtained. If the party to be notified live in one town and have his place of business in another, notice may be sent to either place.¹

It is possible that the indorser may live in a very sparsely settled part of the country, and that there may be no post-office in the town in which he lives. In such a case the holder does all that is required by sending notice directed to the indorser at the nearest town having a post-office, so far as can be ascertained by reasonable inquiry.²

In a case of removal by the indorser, of which the holder has no notice otherwise, the indorser should inform him if he wants notice sent to his new place of residence. In the absence of notice of the change, notice of the dishonor may be sent to the indorser's former place of business or residence;³ at all events if the notifying party, not satisfied with his previous information, makes inquiry where he would be likely to receive correct information, and then acts accordingly.⁴ Whether one who has, some considerable time before, had sufficient information of the residence of the indorser may afterwards safely act upon that information, and send notice accordingly, without inquiry at the time of sending, may in some cases raise a doubt; but it appears to be the general rule that when nothing has occurred to suggest to the notifying party a change of residence by the indorser, no further inquiry is necessary.⁵

Of cases in which the parties have lived near each other, as for instance, in some small town, the holder knowing where the indorser has lived, it may be presumed from their nearness, together with any frequency of communication and notoriety of removal, that the holder was aware of the indorser's change of domicile.⁶

¹ N. I. L. § 115, 2.

² *Shed v. Brett*, 1 Pick. 401, 411; *Ireland v. Kip*, 11 Johns. 232; *Union Bank v. Stoker*, 1 La. An. 269; *Marsh v. Burr*, Meigs, 68; s. c. 9 Yerg. 253.

³ *Bank of America v. Shaw*, 142 Mass. 290; *Casco Bank v. Shaw*, 79 Maine, 376; *American Bank v. Junk*, 94 Tenn. 624.

⁴ *Saco Bank v. Sanborn*, 63 Maine, 340.

⁵ *Id.*; *Bank of Utica v. Phillips*, 3 Wend. 408; *Gawtry v. Doane*, 51 N. Y. 84; *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639.

⁶ *McVeigh v. Allen*, 29 Gratt. 588, 596; *Bank of Old Dominion v.*

Temporary absence from home does not, according to the unwritten law merchant, amount to removal, so as to require or even permit sending notice to the temporary place of abode; though notice received there in due time will be good. For example: The defendant is indorser and the plaintiff holder of a promissory note, both parties residing in New Jersey. Business, however, takes the defendant to Cleveland, Ohio, for the season of the year when the note matures, and keeps him there much of the time. About November 1 he goes from Cleveland to Chicago on business likely to take some considerable time, and informs the plaintiff that he is going there. He remains in Chicago until November 22, on which day notice of dishonor is mailed to him at that place. The notice is not received, the defendant having left for Cleveland before the notice arrived. On his return to Cleveland, he is informed by the plaintiff of what has happened. The defendant is discharged; a temporary place of abode presumptively not being a place to which notice of dishonor should be sent.¹

Temporary
absence: con-
gressmen.

It seems, however, that, where an indorser has a regular abode for a considerable time in the year, a notifying party, having knowledge of such place of abode, and no knowledge of his proper domicile or permanent home, may send notice to such abode, or give notice there. For example: The defendant, indorser of a promissory note held by the plaintiff, is a senator of the United States, having an abode in Washington during the session of Congress. He leaves an agent in a city near his legal domicile to attend to his business, but of that fact the plaintiff is not aware. Notice of dishonor is seasonably mailed to the defendant at Washington. The notice is deemed good.²

McVeigh, 26 Gratt. 785; s. c. 29 Gratt. 546; *Harris v. Memphis Bank*, 4 Humph. 519; *Bank of Utica v. Phillips*, 3 Wend. 408.

¹ *Walker v. Stetson*, 14 Ohio St. 89; *Cases*, 195. Something is said of the defendant's having had no 'relations to the post-office' in Chicago, whatever that may mean. The real point is that Chicago was not the defendant's place of residence or his post-office address for the purpose in question. Query, whether Cleveland would not have been a proper place to which to send, or at which to give notice? The notice actually given there was too late, because of the delay in sending the letter to Chicago.

² *Chouteau v. Webster*, 6 Met. 1.

Such notice would, more clearly still, be good if the senator had given up his residence in the State he represented, and had left no one there to attend to his business.¹ Perhaps the case of a member of the Legislature at the Capitol, away from home, would fall within the principle governing the case of the example; but cases of the kind have been thought to go to the verge of the law merchant.² The Statute has put the subject upon a better footing by providing that if the party to be notified 'is sojourning in another place, notice may be sent to the place where he is sojourning.'³

In regard to seeking information, inquiry should be made of some one from whom, or through some source of information where, trustworthy information will be apt to be given. It is usual and proper for the notifying party to make inquiry of some other party to the paper, e. g., a later indorser, in regard to the place of residence of indorsers; and such course will be especially proper, if not necessary, where the notifying party has reason to think that any party to the paper knows of such place of residence, assuming, of course, that the party having the knowledge is within reasonable reach.⁴ And if a notary is employed, the holder should give him the benefit of any information he has.⁵

It is not enough, it seems, to make inquiry for an indorser's place of residence at the post-office, where the indorser resides in a large city, unless indeed he has lately been employed in, or connected with, the post-office. The proper way is to consult some good city directory, and in case of removal, then at the indorser's last place of business or of residence.⁶ Or, if in a case of the kind the indorser's name does not appear in the directory, inquiry may be made of some other party, as the maker or acceptor; and if information is given, notice may be sent

¹ *Tunstall v. Walker*, 2 Smedes & M. 638.

² *Walker v. Stetson*, 14 Ohio St. 89; Cases, 195.

³ N. I. L. § 115, 3.

⁴ *Wolf v. Burgess*, 59 Mo. 583; *Gilchrist v. Donnell*, 53 Mo. 591.

⁵ *Edwards v. Thomas*, 66 Mo. 468.

⁶ *Miller v. Farmers' Bank*, 30 Md. 392.

accordingly, whether the information given was right or not.¹ Of course, inquiry may be made of relatives of the indorser.² If on going to the indorser's house to give him notice, the house is found closed and unoccupied, inquiry may and perhaps should be made at the next door, if there be a house near.³

Inquiry should be pursued for the time until some satisfactory, that is, apparently trustworthy, answer is given, or until it is reasonably clear that nothing useful can be found out. When, however, the apparently trustworthy information is received, inquiry may stop, and notice may be sent accordingly; and the notice will be good whether the information was correct or not.⁴ For example: The defendant is indorser of a bill of exchange held by the plaintiff. On discounting the bill, the plaintiff inquires of the drawer where the defendant resides, and receives an answer, according to which he sends notice of dishonor seasonably to the defendant, nothing having occurred to lead him to doubt the correctness of the information. The notice is good, though the information is incorrect.⁵

The place of date of a bill is presumptively the place of residence of the drawer, and so would be the place of date of an indorsement, if added, in regard to the indorser's residence; and there is good authority for the state-^{Place of date.} ment that the notifying party may rely upon such date if he has no reason to doubt whether the drawer or indorser lives at the particular place. For example: The defendant is drawer, and the plaintiff holder, of a bill of exchange dated at A. Notice of dishonor is directed to the defendant, in due time, at A, though A is not his place of residence, and though the plaintiff might have learned on inquiry where the defendant resides. The notice is not received. The defendant's liability is deemed duly fixed.⁶

There is also equally good authority that the notice would

¹ *Gawtry v. Doane*, 51 N. Y. 84.

² *Requa v. Collins*, 51 N. Y. 144.

³ *Williams v. Bank of United States*, 2 Peters, 96.

⁴ *Saco Bank v. Sanborn*, 63 Maine, 340; *Bank of Utica v. Bender*, 21 Wend. 643.

⁵ *Bank of Utica v. Bender*, *supra*.

⁶ *Burmester v. Barron*, 17 Q. B. 828; *Pierce v. Struthers*, 27 Penn. St. 249.

not be sufficient in such a case, in the absence of evidence that the plaintiff had made due inquiry for the defendant's place of residence.¹ But it is to be observed that the defendant, by dating the bill or indorsement as he has done, has himself misled the plaintiff; can the defendant afterwards object to his own act? Clearly, however, if the plaintiff had reason to know that the place of date was not the defendant's place of residence, he cannot safely treat the place of date as the proper address.² And of course the place of date of a bill, note, or cheque has nothing to do with the place of address of an indorser not being also drawer or maker.³

§ 8. DILIGENCE.

The whole matter of the several steps required to fix the liability of an indorser may be summed up, as has already been stated or intimated more than once, by the statement that the law merchant requires reasonable diligence, and that only.⁴ What constitutes reasonable diligence is fixed, presumptively but not absolutely, in certain cases, as in the matter of time of presentment and time of notice of dishonor; in other cases it remains a question of fact upon all the circumstances of the case. However, when the facts are all found or admitted, the court will ordinarily determine, whatever the case, whether they show a compliance with the rule of reasonable diligence.⁵

¹ *Lowery v. Scott*, 24 Wend. 358; *Spencer v. Bank of Salina*, 3 Hill, 520; *Carroll v. Upton*, 3 Comst. 272; *Taylor v. Snyder*, 3 Denio, 145; *Sprague v. Tyson*, 44 Ala. 338; *Tyson v. Oliver*, 43 Ala. 458; *Barnwell v. Mitchell*, 3 Conn. 101.

² *Pierce v. Struthers*, 27 Penn. St. 249. See further, *Mason v. Pritchard*, 9 Heisk. 793.

³ *Lawrence v. Miller*, 16 N. Y. 235, 240; *Spencer v. Bank of Salina*, 3 Hill, 520.

⁴ N. I. L. § 119: 'Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.'

⁵ *Bank of Utica v. Bender*, 21 Wend. 643; *Cases*, 191; *Carroll v. Upton*, 3 Comst. 272; *Walker v. Stetson*, 14 Ohio St. 89; *Cases*, 195; *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Wheeler v. Field*, 6 Met. 290; *Peters v. Hobbs*, 25 Ark. 67; *Farmers' Bank v. Gunnell*, 26 Gratt. 131; *Tardy v. Boyd*, id. 631.

Reasonable diligence having been exercised, the notifying party may, it seems, rest in security; it matters not now what further information may come to hand; even if it show that the information acted upon was false and the true state of things is now made known, it may be disregarded. So it has been held by high authority,¹ though the contrary has been laid down, but in ignorance apparently of the former decision.²

What has been said in the foregoing sections is said upon the assumption that no excuse for omitting the step or steps has arisen.

¹ *Lambert v. Ghiselin*, 9 How. 552.

² *Beale v. Parrish*, 20 N. Y. 407.

CHAPTER XI.

INDORSER'S CONTRACT CONTINUED: EXCUSE OF STEPS.

§ 1. TEMPORARY EXCUSE.

HERETOFORE it has been assumed that no question of permanent excuse in regard to the steps for fixing the indorser's liability was involved, though mere delays and the reasons therefor, or temporary excuses, have been under consideration from time to time. The law in regard to temporary excuses may be thus summed up: Whenever it has become impracticable, without fault of the holder, to take the steps at the time required, the holder is excused from doing so until a reasonable time after it becomes practicable to take the steps.¹ Of course if the indorser himself has caused the delay, as by indorsing just before or at maturity, at a place too distant for presentment thereupon, at maturity, the indorser will not be permitted to object to the delay.

Now, however, we encounter cases in which one or more of the steps was omitted altogether, and the plaintiff's contention is that the taking of the steps at any time was unnecessary, the law merchant finding in the facts a sufficient excuse for the omission. What facts then excuse, not some delay, but permanent omission, the indorser being held, notwithstanding, as if all the steps presumptively required had been taken? Waiver and facts not of waiver may constitute such excuse.

¹ N. I. L. §§ 88, 120. See *Windham Bank v. Norton*, 22 Conn. 213; *Cases*, 132; *Farmers' Bank v. Gunnell*, 26 Gratt. 131; *Tardy v. Boyd*, id. 631; *Lane v. Bank of West Tennessee*, 9 Heisk. 419; *Dunbar v. Tyler*, 44 Miss. 1; *Durden v. Smith*, id. 548; *Bank of Old Dominion v. McVeigh*, 26 Gratt. 785, 805, 806.

§ 2. PERMANENT EXCUSE OF BOTH PRESENTMENT AND NOTICE.

The most common cases are waivers. A waiver is an abandonment or surrender of a known right, like gifts, requiring no consideration,¹ and may be express or implied. There is nothing to prevent the waiver by an indorser of all the conditions upon which his undertaking otherwise would depend. Thus he may write, in connection with his indorsement, the words 'waiving demand and notice,' or he may orally² waive demand and notice, or the instrument itself may be executed with such a waiver written in the body of it.³ Such act will make it unnecessary for the holder to take any of the steps ordinarily required for fixing liability, the word 'demand' being understood to include presentment.

What is meant by waiver: examples.

An unconditional promise to pay, or assurance of payment, made by the indorser, would have a like effect; it would be equivalent to an express waiver of the taking of any steps.⁴ For example: The defendant is indorser and the plaintiff holder of a promissory note. The defendant being indebted to the plaintiff has given to him the note, indorsing it as security for the debt. The maker dies before the note matures, and afterwards before its maturity the plaintiff intrusts it to A for collection. A calls upon the defendant and asks him if he (A) should have the note protested against the maker's estate. The defendant replies that he need not do so, and says that the note shall be paid at maturity. A puts the note away in his portfolio, where it remains until after maturity, no steps being taken for fixing the defendant's liability. The taking of such steps is unnecessary.⁵

Promise to pay, and the like.

¹ Compare renunciation of rights. 'The holder may expressly renounce his rights against any party to the instrument before, at, or after maturity.' N. I. L. § 129. E. g. by striking out an indorsement.

² An indorser may estop himself from setting up the benefit of a statute requiring waivers to be in writing. *Hallowell Bank v. Marston*, 85 Maine, 488.

³ *Phillips v. Dippra*, 93 Iowa, 35.

⁴ *Glidden v. Chamberlin*, 167 Mass. 486.

⁵ *Sigerson v. Mathews*, 20 How. 496.

Indeed, when an indorser says to the holder that an arrangement for payment of the paper is about to be made, and either in direct terms or by reasonable implication requests the holder to wait or to give time, that amounts to an assurance that the paper will be paid either by the promisor or by the indorser; and hence it is a waiver of presentment and notice. For it tends to put the holder off his guard and to induce him to forego the ordinary steps, so that it would be unjust to urge the omission of those steps thereafter.¹ But it must be reasonably clear that the indorser's promise or assurance is to pay; words on occasions of the kind are not to be taken very strongly against the indorser. Thus for the indorser to say that he would 'stand good' for payment is not to say that he will pay, and is no waiver of steps.²

In the case of inland bills, promissory notes, and cheques, it seems that a 'waiver of protest' will have the like effect; clearly it will where the parties have already given that interpretation to such words in their previous recent dealings. For example: The defendant is indorser and the plaintiff holder of a promissory note. The defendant sends to the plaintiff a writing in the following words: 'I do request that hereafter any notes that may fall due in the Union Bank [the plaintiff], on which I am or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested.' The plaintiff and defendant have had a course of dealings founded upon interpretation of the writing as a waiver of all steps. No steps to fix the defendant's liability are necessary.⁴

¹ *Gove v. Vining*, 7 Met. 212; *Bryant v. Wilcox*, 49 Cal. 47; *Moyer's Appeal*, 87 Penn. St. 129.

² *Freeman v. O'Brien*, 38 Iowa, 406. But this case appears to have leaned too far in favor of the indorser, in view of other facts which appear in it. An indorsement with the words 'eventually accountable' would waive presentment and notice. *McDonald v. Bailey*, 14 Maine, 101. So would writing the word 'Holden.' *Bean v. Arnold*, 16 Maine, 251.

³ *Townsend v. Lorain Bank*, 2 Ohio St. 345.

⁴ *Union Bank v. Hyde*, 6 Wheat. 572. See also *Duvall v. Farmers' Bank*,

But the term 'protest,' in its legal sense, is naturally unsuited to any step *required* in the law of inland bills, promissory notes, and cheques. Still it is plain that the intention in a waiver of protest in such cases is something more than the idle one of waiving what is unnecessary; and hence a case for interpretation is raised. That may have been attended to by the parties, as we have seen; if the action of the parties has not furnished an interpretation, the court must do the best it can. In the authority from which the last example is taken, it was intimated that mere naked waiver of protest would not excuse the requirement of demand and notice (and it would not, in the case of a foreign bill); but it has been decided in other cases that such a waiver would be *prima facie* evidence of intention to waive demand and notice, since otherwise it would have to be treated as having no effect at all.¹ And the same has been held of the anomalous expression, 'I waive demand of protest.'² This view has been adopted by the Statute.³

Waivers may be made not only before maturity, but afterwards as well, after the time for taking the steps has passed and the indorser has ceased to be under any liability.⁴ Waiver after maturity. It is a peculiarity of certain waivers, of which this one is an example, that their validity does not depend upon consideration or the doing or omitting to do anything in reliance upon them. Still when made after maturity, the supposed waiver must have been made with full knowledge that the indorser was discharged, in order to avail.⁵ And if the indorser

7 Gill & J. 44; s. c. 9 Gill & J. 31; Bird v. Le Blanc, 6 La. An. 470; Scott v. Greer, 10 Barr, 103.

¹ Coddington v. Davis, 1 Comst. 186; Carpenter v. Reynolds, 42 Miss. 807; Townsend v. Lorain Bank, 2 Ohio St. 345; Brown v. Hull, 33 Gratt. 233.

² Porter v. Kemball, 53 Barb. 467.

³ N. I. L. § 118: 'A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.'

⁴ N. I. L. § 116; Sigerson v. Mathews, 20 How. 496; Rindge v. Kimball, 124 Mass. 209; Matthews v. Allen, 16 Gray, 594; Lewis v. Brehme, 33 Md. 412; Freeman v. O'Brien, 38 Iowa, 406.

⁵ Ross v. Hurd, 71 N. Y. 14; Freeman v. O'Brien, *supra*; Glidden v. Chamberlin, 167 Mass. 486; Third Nat. Bank v. Ashworth, 105 Mass. 503;

should actually make payment, supposing that his liability had been fixed when it had not, he could recover the money back.¹ If, however, the *facts* in the matter were known to the indorser when he made the promise to pay, or other waiver, that would be enough; that he did not know the legal effect of them would not, it is held, help him.²

Next of excuse not by way of waiver. A common case of the kind arises where the maker or acceptor, or other party primarily liable (for the maker or acceptor may have signed for accommodation), places an available fund in the hands of the indorser with which to indemnify him if called upon to pay, the fund being sufficient for the purpose. Presentment and notice are deemed unnecessary in such a case ;³ the indorser takes the place of the one primarily liable. There may be ground for doubting whether the steps could be omitted where the fund was insufficient to indemnify the indorser ;⁴ though it seems that the steps may be omitted where the entire estate of the maker or acceptor is put into the indorser's hands to indemnify him on his indorsement,⁵ for in such a case too the indorser virtually takes the place of the principal debtor.

Clearly, however, where the fund in question is put into the indorser's hand to satisfy demands which he is or may become absolutely bound to pay, the steps are not made unnecessary. For example: The defendant is indorser and the plaintiff holder of a promissory note. The maker has before maturity made an

Sheridan *v.* Carpenter, 61 Maine, 83; Walker *v.* Rogers, 40 Ill. 278; Dey *v.* Martin, 78 Va. 7.

¹ Sheridan *v.* Carpenter, *supra*.

² Rindskopf *v.* Doman, 28 Ohio St. 516; Cheshire *v.* Taylor, 29 Iowa, 492; Glidden *v.* Chamberlin, 167 Mass. 486, 495; Third National Bank *v.* Ashworth, 105 Mass. 503; Matthews *v.* Allen, 16 Gray, 594; Givens *v.* Merchants' Bank, 85 Ill. 442, 444.

³ Beard *v.* Westerman, 32 Ohio St. 29; Develing *v.* Ferris, 18 Ohio, 170; Coddington *v.* Davis, 3 Denio, 16; s. c. 1 Comst. 186; Kramer *v.* Sandford, 4 Watts & S. 328; Perry *v.* Green, 4 Harrison, 61; Andrews *v.* Boyd, 3 Met. 434; Marshall *v.* Mitchell, 34 Maine, 227. But see 2 Daniel, *Neg. Inst.* 1125, 1143.

⁴ See Watkins *v.* Crouch, 5 Leigh, 522.

⁵ Bond *v.* Farnham, 5 Mass. 170.

assignment of his property to the indorser in trust for the benefit of his creditors, among them the indorser, to secure them against all debts due them from the maker. The steps for fixing liability are omitted. The defendant is discharged; the proper interpretation of the assignment being deemed to be that it was intended as an indemnity against absolute liabilities only. Hence the assignment did not make the steps unnecessary.¹

It may be too that to excuse the steps, the fund placed in the indorser's hands should be property, or securities available immediately, such as bonds payable on demand. It has been held that the putting into an indorser's hands ordinary choses in action as collateral security, by which is probably meant choses not at once available, will not excuse the steps.² So if the funds in the indorser's hands have arisen from business in which the indorser is a partner with the maker or acceptor, there is no sufficient reason for omitting the steps, especially where such funds can be used only for the payment of paper at maturity.³ So also where the funds are held by the indorser as executor or administrator of the estate of the maker or acceptor, they cannot be considered as immediately available to indemnify him; they are not put there for that purpose, and the executor or administrator cannot prefer himself.⁴

In case the indorser should prove to be the primary debtor at the outset, the maker or the acceptor having acted merely for his accommodation, he would not be entitled to presentment and notice any more than if he had appeared upon the paper in his true character.⁵ He cannot suffer prejudice by the omission, because there is no one, party to the paper, bound to indemnify him, or if there be one liable

¹ *Creamer v. Perry*, 17 Pick. 332.

² *Kramer v. Sandford*, 4 Watts & S. 328; *Seacord v. Miller*, 3 Kern. 55; *Otsego Bank v. Warren*, 18 Barb. 290.

³ *Ray v. Smith*, 17 Wall. 411.

⁴ *Juniata Bank v. Hale*, 16 Serg. & R. 157; *Magruder v. Union Bank*, 3 Peters, 87; s. c. 7 Peters, 287.

⁵ *Bank of Old Dominion v. McVeigh*, 26 Gratt. 785; *Witherow v. Slayback*, 158 N. Y. 649, 660; N. I. L. § 87, which adds, if the indorser 'has no reason to expect that the instrument will be paid if presented.'

with him as principal debtor, there is no one whose liability he could affect by notice of dishonor. Indeed, much of the subject may be summed up by the statement that if the indorser cannot possibly be prejudiced by the omission, the omission is to be excused.¹ It is enough, however, to require the steps that the indorser *may* suffer prejudice from the omission of them; the indorser is not required to show that he *has* suffered prejudice by the omission; it is for the plaintiff to show that the indorser could not possibly have suffered.²

The fact that the note, bill, or cheque has been lost does not dispense with these steps, for a copy may be used in making
 Loss of presentment, with an offer of indemnity against
 instrument. liability upon the lost instrument.³

§ 3. EXCUSE OF PRESENTMENT.

Some excuses go no further than to justify the omission of presentment and demand, or, perhaps, but one of these two
 Limited waiver steps, for it is to be remembered that presentment
 or other ex- and demand are separate steps, severally required
 cause: present- in the absence of legal excuse; and, further, ex-
 ment: demand. cuses are looked upon with scrutiny, and not allowed unless
 plainly made out.

First, in regard to excuses for failing to make presentment as distinguished from demand. Such a case arises where the maker or acceptor, understanding or professing to understand the errand of the holder, declines to see the paper, or expressly or virtually tells the holder that he need not produce it. A case

¹ *Smith v. Miller*, 52 N. Y. 545; *Welch v. Taylor Manuf. Co.*, 82 Ill. 579, drawer.

² *Foster v. Parker*, 2 C. P. D. 18; also cases in note 1. Many of the cases relate to the omission of notice only, but the principle is sufficient to cover all the steps.

³ *Lane v. Bank of West Tennessee*, 9 Heisk. 419. Compare *Fales v. Russell*, 16 Pick. 315; *Tuttle v. Standish*, 4 Allen, 481; *Hopkins v. Adams*, 20 Vt. 407; *Thayer v. King*, 15 Ohio, 242. These are cases of actions sustained against the maker of lost notes, of course upon copies; it follows that presentment may be made upon a copy.

of the kind would arise where the maker or acceptor, before the paper is produced, should absolutely repudiate all liability upon it, and refuse to pay it; that would be a waiver of presentment, certainly where the holder called for payment at the proper place, as, for example, at the counting-house of the maker of a note;¹ *perhaps*, it would be a waiver wherever demand was made.² Mere refusal of payment, however, is no waiver of omitting presentment. For example: The defendant is indorser and the plaintiff holder of a promissory note. At maturity the plaintiff, not having the note with him, calls upon the maker, and demands payment, which is refused. The defendant is discharged, the refusal being no waiver of the requirement of presentment.³

Excuse of demand will doubtless excuse presentment; but, perhaps, excuse of presentment, in the special sense of that term which distinguishes it from demand, would not make demand unnecessary. Waiver of presentment, made by an indorser after maturity, must have been made with knowledge of the omission, in order to be valid.⁴

It will not be needful to separate the two steps further, and accordingly presentment may be taken as including demand.⁵

Removal of the maker or acceptor from the State, after the making or acceptance, excuses the holder from any duty to follow him, such as would rest upon the holder in Effect of case of removal to some other place within the removal. State in which the paper is payable. The removal would not, according to good authority,⁶ though there is also contrary

¹ Waring v. Betts, 90 Va. 46.

² See King v. Crowell, 61 Maine, 244.

³ Arnold v. Dresser, 8 Allen, 435.

⁴ Compare ante, p. 169.

⁵ The Statute appears to speak of presentment as including demand; at any rate it does not separate the two acts, in speaking of excuses. 'Presentment for payment may [why *may*?] be dispensed with (1) where after . . . reasonable diligence presentment as required by this list cannot be made; (2) where the drawee is a fictitious person; (3) by waiver of presentment, express or implied.' N. I. L. § 89. See § 88 as to delay.

⁶ Wheeler v. Field, 6 Met. 290.

authority,¹ excuse the holder from making presentment at the last place of business or residence of the maker or acceptor; but presentment there would clearly be sufficient. For example: The defendant is indorser and the plaintiff holder of a promissory note payable generally and made at Troy, New York, where the maker resided at the time of making the note. Afterwards, before the maturity of the note, the maker removes to Florida, where he resides when the note matures. The plaintiff makes presentment at the maker's last abode in Troy, and not receiving payment, gives notice of dishonor presently. No presentment in Florida is made. The liability of the defendant is duly fixed.²

Concerning the effect of absconding there is some conflict of authority. The more general doctrine is that such act excuses the holder from all duty to make presentment. *Effect of absconding.* For example: The defendant is indorser and the plaintiff holder of a promissory note, the maker of which, before its maturity, absconds to parts unknown; whereupon at maturity, the plaintiff, without taking other steps, gives notice of dishonor to the defendant. The defendant's liability is duly fixed.³

The same authorities, however, which, in case of removal beyond the State, require presentment at the last abode or place of business, recalling the doctrine that the holder is *Removal beyond the State.* bound to exercise due diligence in endeavoring to obtain payment from the maker or acceptor, refuse to accept that view of the case. These authorities require the plaintiff to show that, notwithstanding the absconding, he has exercised

¹ *Foster v. Julien*, 24 N. Y. 28; *Gist v. Lybrand*, 3 Ohio, 308. See *Reid v. Morrison*, 2 Watts & S. 401.

² See *Taylor v. Snyder*, 3 Denio, 145. But if, as was the actual case in *Taylor v. Snyder*, the maker lived at the time of making the note in another State or country from that in which it was made, presentment there would be necessary. See ante, p. 112.

³ *Lehman v. Jones*, 1 Watts & S. 126; *Reid v. Morrison*, 2 Watts & S. 401; *Taylor v. Snyder*, supra; *Spies v. Gilmore*, 1 Comst. 321; *Wolfe v. Jewett*, 10 La. 383. The same rule prevails in the case of bills of exchange: *Lehman v. Jones*, supra.

some diligence in order to obtain payment of the primary debtor; some inquiry should be made.¹

The insolvency of the maker or acceptor, though known to the indorser at the time of his indorsement, is not an excuse for failing to make presentment. For example: The defendant, payee of an overdue promissory note, indorses it knowing that the maker is insolvent, the plaintiff discounting it for him at its face value. Presentment is not made within reasonable time. The defendant is discharged from liability.²

Waiving notice of dishonor does not excuse the holder from making presentment. For example: The defendant, an indorser of a promissory note, writes before or after his signature the words, 'Waiving notice.' The plaintiff, holder of a note at maturity, omits to make presentment of the note for payment as well as to give notice of dishonor. The defendant is discharged.³

In some States, contrary to the rule in others, the fact that the maker or acceptor has deceased at the time of the maturity of the note or bill, and that the paper matures before the end of the period in which his personal representative is exempt from liability to suit, excuses presentment altogether. For example: The defendant is indorser and the plaintiff holder of a promissory note due October 4. The maker dies in September preceding, administration is duly granted, and notice thereof is given the same month. No presentment is made at the maturity of the note or at any other time to the administrator, but notice of non-payment is given to the defendant in due season. The defendant's liability is deemed fixed, presentment not being considered necessary.⁴

¹ *Pierce v. Cate*, 12 Cush. 195, overruling some earlier decisions and dicta.

² *Bassenhorst v. Wilby*, 45 Ohio St. 333.

³ *Berkshire Bank v. Jones*, 6 Mass. 524; *Cases*, 212. See also *Voorhies v. Attee*, 29 Iowa, 49; *Buchanan v. Marshall*, 22 Vt. 561; *Lane v. Steward*, 20 Maine, 98; *Backus v. Shipherd*, 11 Wend. 629. But see *Matthey v. Gally*, 4 Cal. 62.

⁴ *Hale v. Burr*, 12 Mass. 86. See *Oriental Bank v. Blake*, 22 Pick. 206;

If, however, the paper should become due after the period of exemption has passed, presentment should be made.¹

The Statute thus deals with excuse touching presentment for acceptance: Where the holder of a bill payable elsewhere than at the drawee's place of business or residence has not time, by reasonable diligence, to present the bill for acceptance before presenting it for payment on the day it falls due, delay in presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.²

Presentment for acceptance is excused, and the bill may be treated as dishonored by non-acceptance (1) where the drawee is dead, or has absconded, or is a fictitious person, or has not capacity to contract by bill; (2) where, after reasonable diligence, presentment for acceptance cannot be made; (3) where though presentment has been irregular, acceptance has been refused on some other ground.³

§ 4. EXCUSE OF PROTEST.

As we have seen, the term 'protest,' as used by the law merchant, applies only to foreign bills of exchange, though by practice, to which the sanction of statute has widely been given, it has come to be, or rather it has long been, applied also to inland bills, promissory notes, and cheques. But the law merchant has not lost its supremacy in the matter; the protest of a foreign bill having, as we have seen, a significance not attaching to the protest of other paper. Protest in the case of a foreign bill is one definite and altogether unique act; in the case of other paper, while it naturally points to the same unique act, it has come to be used in a loose and vague sense, making it include other or even all the steps for fixing liability.

The consequence is that excuse of protest has ordinarily a

Landry v. Stansberry, 10 La. An. 484. But see Gower v. Moore, 25 Maine, 16, and qu. the soundness of the rule in Hale v. Burr. It would seem to be merely a case of temporary impediment rather than permanent excuse.

¹ Oriental Bank v. Blake, supra.

² N. I. L. § 154.

³ Id. § 155.

definite meaning in the one case, and, by the unwritten law, an uncertain meaning in the other. Excuse of protest of a foreign bill, at least when in the form of a written waiver, such as 'waiving protest,' on the bill, is then, apart from statute, naturally to be taken as referring to the distinctive act of protest, and nothing else;¹ unless perhaps the term has received a different interpretation in the practice of the parties.² On the other hand, waiving the protest of paper not requiring protest is an act, as has just been stated, of doubtful import; how it has been interpreted by the courts has already been seen.³ By the better view it excuses presentment and notice.⁴ By the Statute, however, as we have elsewhere seen, waiver of protest, whether of foreign bills or other negotiable instruments, is a waiver of all steps.⁵

§ 5. EXCUSE OF NOTICE.

What is referred to now, as in the case of excuse of presentment above considered, is excuse of notice, excluding cases of excuse of notice and other steps;⁶ in other words, the cases now referred to are those in which the only question raised is upon the failure of the holder or indorser to give notice of dishonor.

Such failure is not justified by any mere waiver of presentment or demand, for such a waiver may be made in confident expectation that the maker or acceptor will be ready and anxious to pay, and will therefore offer payment without waiting to be requested.⁷ Nor, it seems, will an excuse for making presentment, created by law, excuse the requirement of notice.⁸ Thus the absconding of the maker or acceptor to parts unknown, though in some States making pre-

¹ That is fairly to be implied from language in *Union Bank v. Hyde*, 6 Wheat. 572. See also *Coddington v. Davis*, 1 Comst. 186.

² Compare *Coddington v. Davis*, supra.

³ Ante, pp. 168, 169; and see the two cases just cited.

⁴ Id.

⁵ N. I. L. § 118.

⁶ For those cases see § 2, supra.

⁷ Compare *Berkshire Bank v. Jones*, 6 Mass. 524. But waiver of 'notice and protest' waives demand. *Timberlake v. Thayer*, 76 Miss. 76.

⁸ *Bank of Old Dominion v. McVeigh*, 26 Gratt. 755.

sentment unnecessary, does not dispense with the requirement of notice.¹ So too in States in which presentment is excused by law because of the death of the maker, it seems that indorsers are nevertheless entitled to notice of non-payment.² And a personal representative of an indorser deceased is entitled to notice as much as would the indorser himself have been had he lived.³

Indeed, omitting to give notice of dishonor is no more lightly to be excused than is omitting to take any of the other steps required by the law. The law merchant will not, it seems, excuse an omission to give notice except upon a waiver plainly having in view the very matter of notice; unless it is clear that notice would be of no use whatever, when, indeed, it would be unnecessary, or unless after reasonable diligence it cannot be given to or does not reach the parties to be charged.⁴ If by possibility the indorser might suffer detriment by failing to give him notice, such failing will discharge him.⁵

Accordingly, notice of dishonor is not dispensed with by reason of the fact that the maker or acceptor was insolvent all the time, and that the indorser was aware of the fact. For it does not follow, because a man is insolvent that he may not pay a particular debt, in whole or in part. A debtor is, within certain statutory restrictions, allowed to prefer his creditors; and even where his funds have passed from him, as into the hands of an assignee, friends may be ready to help him or his indorsers in the particular case.⁶

Insolvency of
maker or ac-
ceptor.

¹ *Foster v. Julien*, 24 N. Y. 28, 37; *Michaud v. Lagarde*, 4 Minn. 43. Compare *Lehman v. Jones*, 1 Watts & S. 126; *Cases*, 211.

² See *Hale v. Burr*, 12 Mass. 86, 88, where the court, speaking of demand upon the personal representative within the year of his exemption from suit, says: 'Such a demand would therefore be merely a troublesome formality, without any use; and notice to the indorser that (the promisor being dead) he will be looked to for payment, will in every respect be as advantageous to him as a previous demand upon the promisor.'

³ *Oriental Bank v. Blake*, 22 Pick. 206.

⁴ N. I. L. § 119, as to the last clause of the text. As to delay see *id.* § 118.

⁵ *Foster v. Parker*, 2 C. P. D. 18; *Smith v. Miller*, 52 N. Y. 545; *Welch v. Taylor Manuf. Co.*, 82 Ill. 579.

⁶ *Barton v. Baker*, 1 Serg. & R. 334.

Even in the case of an express waiver of notice, the waiving heretofore suggested should be borne in mind where the waiver was after maturity; in such a case, the act, to be ^{Knowledge} valid, must have been done with knowledge that ^{of facts.} notice had not been given.¹

There are one or two cases of excuse of notice peculiar in that they concern only the drawers of bills of exchange or of cheques. The drawer's contract has been explained in a preceding chapter, and it was there shown that one who ^{Cases peculiar to drawer of bills or cheques.} draws a bill without reasonable ground to believe that it will be honored by the drawee, or a cheque without having funds to meet it, is treated much as if, instead of having drawn a bill, he had made a promissory note for the sum. Hence he is not entitled to notice in case of dishonor. The case may then be put, and commonly is put, in this way; that the act of drawing in such a case is deemed a fraud in the eye of the law, and notice of dishonor is accordingly unnecessary. This subject has, however, been fully dealt with in Chapter VII., and need not be further considered here. It should be observed, however, that in such case the law dispenses with notice to the drawer only; indorsers must still be notified, for they are no parties to the fraud, though it would be otherwise of an indorser who is the drawer of the bill.

To draw upon one's self, as was seen in Chapter VII., also dispenses with the requirement of notice, and perhaps of presentment; and so of cases in which the drawer draws upon a partnership of which he is a member, and the like cases referred to in Chapter VII. In these cases, too, the excuse extends only to the drawer; an indorser (not being drawer) is still entitled to notice.

The Statute, beginning with the case of the drawer, deals thus with the subject: Notice of dishonor need not be given to the drawer, (1) where the drawer and drawee are ^{How the Statute deals with the subject.} the same person; (2) where the drawee is a fictitious person or a person not having capacity to contract; (3) where the drawer is the person to whom the

¹ Ante, p. 169.

instrument is presented for payment; (4) where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument; (5) where the drawer has countermanded payment.¹ It then declares that notice need not be given to an indorser, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed; (2) where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.² And where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is unnecessary unless meantime the instrument has been accepted.³

¹ N. I. L. § 121; ante, pp. 71-75.

² Id. § 122; *American Bank v. Junk*, 94 Tenn. 624. So of accommodation maker. *Carlton v. White*, 99 Ga. 384.

³ N. I. L. § 123.

CHAPTER XII.

VENDOR'S CONTRACT.

THERE is one contract arising from an instrument of the law merchant which, paradoxically as the statement sounds, is substantially a contract, or the equivalent of a contract, of the common law ; the contract, namely, of the holder of a negotiable instrument who for value transfers his title by delivery, that is, without indorsement, or by delivery with qualified indorsement as 'without recourse.'

In its nature and incidents such a transaction is like a sale by the common law ; the contract entered into with the transferee is the contract of a vendor at common law.¹ The special liability of an indorser, as already described, is of course excluded.

Nature and incidents as in sale.

The law is thus stated by the Statute, which conforms to the unwritten law: Every person who negotiates an instrument by delivery (only), or by a qualified indorsement, warrants (1) that the instrument is genuine,² and in all respects what it purports to be; (2) that he has a good title to it;³ (3) that all prior parties had capacity to contract;⁴ (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.⁵

¹ Meyer v. Richards, 163 U. S. 385.

² Littauer v. Goldman, 72 N. Y. 506 ; Bell v. Dagg, 60 N. Y. 528 ; Coolidge v. Brigham, 5 Met. 68 ; Clarke v. Patrick, 60 Minn. 269.

³ Meriden Bank v. Gallaudet, 120 N. Y. 298.

⁴ Littauer v. Goldman, supra.

⁵ N. I. L. § 72. Provision (3) does not apply to persons negotiating public or corporate securities other than bills and notes. Id. ; Otis v. Cullum, 92 U. S. 448.

When the transfer is by delivery only, the warranty is a pure warranty of the common law; accordingly it is not negotiable, extending only to the holder's immediate transferee.¹ Qualified indorsement, like special or blank indorsement, is of course negotiable, and hence the warranty passes to all subsequent holders in due course.

It has sometimes been considered, under the unwritten law, that there was a distinction, in regard to the warranty of genuineness, between cases in which the instrument was sold and cases in which it was transferred in payment of a debt due or then created or to secure a debt. In the former case it has been thought that the common law doctrine of caveat emptor should apply, and that the buyer should be treated as having bought at his own risk; the warranty being applicable only to the second case.² But the distinction has been more generally considered as not well taken, and the warranty, as in the Statute, held to cover both cases.³

On the other hand there has been some disagreement upon the question whether the warranty should not extend to the *solvency* of the parties primarily liable. Some courts hold that it should, where the paper was worthless, though genuine, when passed, and the transferee took it without notice, though the seller was also ignorant of the fact;⁴ other courts deny any such warranty.⁵ The latter is probably the better doctrine; the Statute is silent on the subject.

¹ N. I. L. § 72.

² *Baxter v. Duren*, 29 Maine, 434, 440; *Fisher v. Rieman*, 12 Md. 497, reversing 4 Am. Law Reg. 433; *Buddecke v. Alexander*, 20 La. An. 563.

³ *Hussey v. Sibley*, 66 Maine, 192, 196, overruling *Baxter v. Duren*, supra. See *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258; *Bell v. Dagg*, 60 N. Y. 528; *Allen v. Clark*, 49 Vt. 390; *Bankhead v. Owen*, 60 Ala. 457; *Bell v. Cafferty*, 21 Ind. 411; *Thompson v. McCullough*, 30 Mo. 224; *Gurney v. Womersley*, 4 El. & B. 133.

⁴ *Bayard v. Shunk*, 1 Watts & S. 92; *Ware v. Street*, 2 Head, 609; *Edmund v. Digges*, 1 Gratt. 359, and other cases.

⁵ *Ontario Bank v. Lightbody*, 13 Wend. 101; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Maine, 88; *Harley v. Thornton*, 2 Hill (So. Car.), 509; *Townsend v. Bank of Racine*, 7 Wis. 185; *Westfall v. Braley*, 10

The warranty in question arises of course by implication of law, and is only presumptive except perhaps in the case of qualified indorsement. The transferrer by delivery may therefore show that as a matter of fact he refused to warrant,¹ or that the warranty was modified in the negotiation, or that some other agreement was substituted for it. In the case of qualified indorsement it may be doubted whether any such evidence would be admissible unless it was reduced to writing.

The warranty only presumptive.

The Statute also provides that a broker or other agent who negotiates an instrument without indorsement incurs all the liabilities of warranty, unless he discloses the name of his principal and the fact that he is acting only as agent.²

Brokers and other agents.

Ohio St. 188 ; *Magee v. Carmack*, 13 Ill. 289 ; *Timmins v. Gibbins*, 18 Q. B. 72, and other cases.

¹ *Bell v. Dagg*, 60 N. Y. 528. General refusal to answer for the instrument would however be consistent with an implied warranty of genuineness. *Id.*

² N. I. L. § 76.

CHAPTER XIII.

ACCOMMODATOR'S CONTRACT.

§ 1. NATURE : CONSIDERATION : SURETYSHIP.

THE legal effect of each of the contracts dealt with in the foregoing chapters, except the last one, will be modified somewhat, if it appears that the defendant signed the instrument without consideration for the accommodation of another party. The result is an accommodation contract, which may be described as a gift by A to B, of A's credit, to be offered to another on payment of value. A contract of the kind may take any of the forms of the law merchant; a promissory note may be made or indorsed for accommodation; a bill of exchange may be drawn, accepted, or indorsed for accommodation; a cheque may be drawn or indorsed for accommodation. In a word, any party to the instrument may be an accommodation party.¹

Accommodation contracts of the kind are contracts of the law merchant as much as are those which are supported by a valuable consideration at the outset. At the outset, we say, for though accommodation contracts are not so supported when first executed, a valuable consideration must spring up afterwards to make the contract binding; some one afterwards must have taken the paper for value in order to have a claim upon the accommodation party. For example (hypothetical): The defendant accepts a bill of exchange for the accommodation of the drawer, and the drawer makes a gift of the bill

¹ N. I. L. § 36 : 'An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.'

to the payee and plaintiff. The defendant is not liable upon his acceptance.¹

There is then nothing peculiar in the case so far. Nor is there anything peculiar in any other phase of the contract of an accommodation party under the law merchant Peculiarity of in its ordinary application. Whatever would be the contract. necessary to make a case against one who had signed originally for value is equally necessary to make a case against an accommodation party; and whatever would be effective against a party who signed for value will also be effective against an accommodation party after a consideration has sprung up. What is peculiar to the situation of such a party lies in the fact that he is in a certain sense only a surety for the party for whom he has given his credit. Whatever the outward form of the contract, even though the accommodation party made as such his promissory note, and the person for whose accommodation it was made is an indorser of it, or indeed is not a party to it at all, the accommodated party or person is, between the two, the principal debtor, and the accommodation party the surety.²

The accommodation party is a surety, however, not always in the full sense, but often only sub modo. It appears to have been considered at one time that he was in all cases a surety in the full ordinary sense; but the How far a surety. authorities now consider that the suretyship may be essentially modified by the natural character of this particular contract made by the accommodation party. Thus, if a person has accepted a bill of exchange for the accommodation of the payee, a subsequent indorsee, though with notice, may still treat him as an acceptor, not merely in point of liability in the ordinary way of acceptance, but also in regard to the more special questions of suretyship, because he has taken a principal's position. That is to say, the acceptor is not a surety towards the holder, though the holder knows that he accepted for accommodation; he is a surety only between himself and the party for whose accommodation he accepted. Accordingly, he will not be discharged by acts of the holder, which would discharge him if he

¹ N. I. L. § 36, as just cited.

² Burton v. Slaughter, 26 Gratt. 914.

were an ordinary surety, or if he were an accommodation *indorser*; for an indorser is a surety for parties before him.¹

A person may lend his name to another for *value*, as an 'accommodation' in a popular sense; but lending will not be accommodation in the sense of the law merchant unless it was a gratuity.² If the lending was for value, the paper is ordinary business paper; as much as if there had been no 'accommodation' at all. Thus, persons may, for each other's aid, exchange their own promissory notes, each for instance taking a note payable to the order of the other, of the same amount; and the exchange made, each note becomes an instrument for value. The exchange has converted accommodation paper in proper sense into business paper, and the makers of each are now liable as principal debtors.³

§ 2. TAKING WITH NOTICE.

There is another doctrine touching accommodation acceptance of significance, and that is, that though the undertaking is (originally) without consideration, it stands upon a footing radically different from other cases of contracts wanting consideration. If a man makes a promissory note, accepts a bill of exchange, or indorses paper, upon the supposition that there is a valuable consideration for his undertaking when there is not, or if there is a failure of the consideration, a person taking the paper with notice, though for value, cannot hold him (with an exception which need not be mentioned here); whereas if the party's undertaking was for accommodation, he would be liable, though the holder *did* take

Distinguished
from other
cases of notice.

¹ See post, p. 259.

² Peale v. Addicks, 174 Penn. St. 543; Peoria Manuf. Co. v. Huff, 45 Neb. 7; N. I. L. § 36.

³ State Bank v. Smith, 155 N. Y. 185. See also Merchants' Bank v. Cummings, 149 N. Y. 360; Hapgood v. Wellington, 136 Mass. 217. So where A lends his own note to B, and B gives to A his (B's) note for security, A holds B's note for value, and it is well held may sue upon it before being compelled to pay his own. Merchants' Bank v. Cummings, supra; Hapgood v. Wellington, supra; Russell v. La Roque, 11 Ala. 352. But see Osgood v. Osgood, 39 N. H. 209; Child v. Powder Works, 44 N. H. 354.

the paper with notice or even with full knowledge, if he took it for value, before maturity.¹

The reason is not far to seek. Where the undertaking is for accommodation, the party makes an offer by way of gift, with full understanding, of his credit, intending to respond to any one who acts upon the offer ; where the undertaking is supposed by the party making it to be for value when it is not, or when the value fails, he has acted in mistake, never intending to bind himself with consideration wanting.

In the doctrines relating to suretyship and consideration are found the characteristic features of accommodation contracts. The object of the present chapter is only to call attention to and explain the general features of such contracts, as one of the forms of contract of the law merchant, to show that there are such contracts, and what in general they are. The details concerning them will be dealt with more conveniently, as details of the same nature arise in connection with the other contracts of our subject. Thus, dealings with the principal debtor in their effect upon subsequent parties, the extent of the liability of accommodation parties, and other matters of detail will be considered in later chapters.

¹ N. I. L. § 36 ; *Maffat v. Greene*, 149 Mo. 48. See *Merchants' Bank v. Cummings*, 149 N. Y. 360. If the accommodation instrument was taken from the accommodated party, after maturity, the case will of course be different. *Peale v. Addicks*, 174 Penn. St. 549 ; *Chester v. Dorr*, 41 N. Y. 279 ; *Kellogg v. Barton*, 12 Allen, 527.

CHAPTER XIV.

ASSURER'S CONTRACT.

§ 1. ANNEXING CONTRACTS OF THE COMMON LAW: GUARANTY AND SURETYSHIP.

THUS far we have had under consideration contracts of the law merchant, with but occasional reference to contracts of the common law annexed to or connected with them. Subject for consideration. The first-named contracts having been severally explained, with reference to their peculiarities, nothing further would remain but a consideration of features common to them all, were it not that it often happens, as has already been intimated in these pages, that some contract of the common law, in the way of further assuring performance of the contract of the law merchant, has been added. The effect of adding such a contract, not upon the contract assured, for that remains unaffected, but upon the common law contract itself, is now, or will from time to time become, a matter of importance. But in order to understand how far the assuring contract has been affected by its connection with a contract of the law merchant, we must first ascertain the very nature of the assuring contract itself, that is, its natural ordinary character, uninfluenced by such connection.

Two terms are used to signify further assurance, namely, guaranty and suretyship; to which should be added the executed assurance of mortgage. Guaranty and suretyship are terms often loosely employed, the one for the other, and each made to express a certain broader meaning than, strictly taken, it should bear. That is especially true of the use of the term surety or suretyship. But there are situations of fact which are followed by very different rules of law, and

these coincide with the meaning of the two terms in their narrower and more specific sense; at all events, it will serve a purpose of convenience, and at the same time prevent confusion, if we use the two terms in the more specific sense conforming to the situations of fact referred to.¹

Accordingly, we may, in the first place, unite the terms guaranty and suretyship under the general designation of contracts of assurance, by which will then be meant any subsidiary contract intended to secure the performance of the contract or contracts assured. Then we may separate the contract of assurance into two parts; first, supposing the assurance to be made as a separate and distinct collateral engagement, to which the name guaranty may be and commonly is given, — guaranty, that is, in the specific sense; secondly, supposing the assurance to be part and parcel of the contract assured, being an engagement then to which the name suretyship may be and commonly is given, — suretyship, that is, again in the specific sense. We shall find important legal consequences flowing from that division. But both guaranty and suretyship are undertakings to answer 'for the debt or default of another' within the meaning of the Statute of Frauds, and must accordingly be in writing and signed by the party to be bound or by his lawful agent.

The nature and incidents of the contracts will appear in the two following sections.

§ 2. GUARANTY (IN SPECIFIC SENSE).

Proceeding to the subject of guaranty in the specific sense of a separate contract, it is obvious that the assuring contract may be made either at the same time with the contract or contracts assured, or afterwards, — or, indeed, ^{Time of guar-} ^{anty.} before the principal contract was made; but cases of that kind are infrequent, and would raise no peculiar legal questions. The time of the guaranty raises certain questions in regard to consideration. It should be observed that both the guaranty and the contract assured must be supported by a valuable considera-

¹ On the difference see *Saint v. Wheeler Co.*, 36 Am. St. Rep 210 and note.

tion. If the contract assured is wanting in that respect, the guaranty must fall to the ground, though itself founded upon a valuable consideration; and on the other hand, though the contract assured is well supported in that respect, if the guaranty is not well supported also, it must fail. The connection of the guaranty with a contract of the law merchant in no way affects the case.

Where, however, the guaranty is made at the same time, that is, in the same general negotiations and substantially at the same time with the principal contract of the law merchant, it is not necessary that it should be supported by any separate consideration from that of the principal engagement.¹ Both contracts being made at the same time, it matters not that the consideration more immediately and fully belongs to the principal one; the guaranty, though separate in form, in terms, and in effect, makes part of a general consideration; in other words, in common language of the books, the consideration which supports the principal contract supports the guaranty.

At this point it is necessary to guard against a possible mistake. Does the guaranty, in the entire absence of evidence of consideration, now draw from the contract of the law merchant, which it assures, any of its properties? In a suit upon the contract assured, the law merchant, as we have seen, raises a presumption of consideration to support the instrument when produced at the trial; does this presumption flow over to the guaranty? The answer is not clear; but on the theory that the law should be founded on custom, it may perhaps be in the negative, for there is no custom touching the point. According to this view the guaranty has gained nothing from its connection with the more favored contract, and all consideration to support the guaranty should then be proved as in other cases of contracts of the common law, supposing that it is not under seal. But it more generally happens that the principal contract, for instance a promissory note, recites a consideration for *that* contract, as by the words 'For value received'; in which case it

¹ Osborne v. Gullikson, 64 Minn. 218.

seems that the same evidence may be passed on to support the guaranty.¹

Let it next be supposed that the guaranty is made at some other time, after the making of the principal contract. Now it follows from the very requirement of a consideration to support the guaranty, that there must be a separate consideration to support the assuring engagement; that the consideration which supports the principal contract will not support the guaranty.² There are one or two apparent exceptions; first, where the guaranty was agreed upon at the time of making the principal contract, and it was merely committed to writing afterwards, *nunc pro tunc*;³ and secondly, where the consideration is a continuous thing, running along at the time both of the principal contract and of the guaranty, as in the case of the guaranty of fidelity of a clerk for a year.⁴

Another question now arises touching consideration, to wit, whether the interpretation to be put upon the Statute of Frauds in regard to the necessity of a statement of consideration in the guaranty is affected by the fact that the contract assured is a contract of the law merchant, by which there is a presumption of consideration. The answer is probably in the negative. If, according to the interpretation put upon the Statute of Frauds in a particular State, or according to special legislation, it is necessary in other cases that the guaranty itself should recite or refer to a consideration, it is equally necessary in the case of a guaranty of a bill, note, or cheque; unless the instrument assured contains a recital of consideration and is contemporaneous within the guaranty.⁵

¹ *Bickford v. Gibbs*, 8 Cush. 154. Perhaps on the whole this, rather than custom, is the true view, and covers the whole case. For whatever proves even but presumptively, a consideration to support the principal contract proves enough for the guaranty.

² *Tenney v. Prince*, 4 Pick. 385; *Green v. Shepherd*, 5 Allen, 589, 591; *Moses v. Lawrence Bank*, 149 U. S. 298; *Cases*, 221.

³ *Hawkes v. Phillips*, 7 Gray, 284.

⁴ See *Tenney v. Prince*, *supra*; *Moies v. Bird*, 11 Mass. 436; *Leonard & Wildes*, 36 Maine, 265.

⁵ *Moses v. Lawrence Bank*, 149 U. S. 298; *Cases*, 221.

Indeed in some States language indicating a consideration should appear within the guaranty in any case, and it will not be enough that such language is found in the contract assured. For example (hypothetical): The defendant sued upon a guaranty writes the following words upon the back of a promissory note, the contract being performable in the State of New York: 'I guaranty the payment of this note.' The face of the note reads 'For value received I promise to pay to A, or order,' etc. The defendant, by the law of New York, is not liable, there being no reference to consideration in the guaranty.

In other States the law is satisfied if there is a reference to consideration in the principal contract, as by the words 'For value' used in the last example. In still other States it is not necessary that there should be any statement of, or reference to, consideration in either the principal contract or the guaranty; it is enough that a consideration to support the guaranty existed in fact, and the fact may be shown at the trial.¹

We may now inquire whether a guaranty is by such connection with a negotiable instrument affected in the second peculiar feature of the law merchant, to wit, negotiability. **Negotiability of guaranty.** In regard to that, it should be noticed that the question whether a guaranty becomes, or can become, negotiable by being annexed to a negotiable note, bill, or cheque, has two phases. The question may be (1) whether the guaranty, when written upon the note, bill, or cheque, operates like an indorsement, to give a remote subsequent holder the rights of an indorsee against the guarantor as if an indorser; or it may be (2) whether it operates like an indorsement so as to give the transferee the rights of an indorsee against prior parties.

Both questions turn upon the same ideas, it seems, so that the answer to one must be taken as the answer to the other. **Conflict of authority.** Unfortunately the authorities are not agreed. The earlier American authorities appear to have treated an unrestricted guaranty made by the holder of the paper (usually a promissory note), and written upon it in transferring it, as practically an indorsement; and in some States that view

¹ Packard v. Richardson, 17 Mass. 122.

still prevails. That, of course, means that a general contract of guaranty, when written upon a negotiable contract of the law merchant, is to be taken as a negotiable contract as of the law merchant. For example: The defendant, payee of a negotiable promissory note, writes on the back of it, 'I guaranty the payment of the within note,' signing the same, and transfers the note to another who indorses it to the plaintiff. At maturity the plaintiff presents the note for payment, and payment being refused, gives notice at once to the defendant, as if he were an indorser. The writing quoted is deemed an indorsement, and the defendant's liability is duly fixed.¹

But the question at once arises why should a contract of the common law, as such incapable of negotiability, become negotiable by being written upon a negotiable instrument? Better view of the subject. It is true that when written there by the holder, and followed by transfer, the holder parts with his title; but it does not follow that he parts with it as the law merchant requires in order to give the act the special features of the law merchant. Indeed, in so far as it departs in substance from the requirements of the law merchant, it falls short, or should fall short, of acquiring the features pertaining to an act done in conformity to such requirements. The law merchant knows nothing of guaranty, except in so far as indorsement is guaranty; it requires indorsement to transfer full legal title to paper payable or indorsed to order, and what indorsement is, the law merchant has carefully and consistently laid down, as we have seen.²

Pursuing this or some such line of reasoning, certain later authorities have refused to follow the earlier ones, considering that a guaranty is still a guaranty though written upon a negotiable instrument, and not an indorsement. For example: The defendant is maker, and the plaintiff transferee, of a prom-

¹ Partridge v. Davis, 20 Vt. 499. So Myrick v. Hasey, 27 Maine, 9; Leggett v. Raymond, 6 Hill, 639; Manrow v. Durham, 3 Hill, 584. But these New York cases were never satisfactory at home, and they have been overruled. Spies v. Gilmore, 1 Comst. 321; Hall v. Newcomb, 7 Hill, 416; Waterbury v. Sinclair, 26 Barb. 455.

² Ante, pp. 83, 92-94.

issory note payable to A. The only writing upon the note by A is in the words, 'I hereby guaranty the within note'; but with this writing upon it A transfers the note to F and L who indorse it to the plaintiff, who now as an indorsee sues the maker. The plaintiff is not entitled to recover, the writing quoted being a guaranty, and not an indorsement or the equivalent of an indorsement.¹

Of course, the result of such a ruling is more than technical. It is not merely a ruling that the transferee cannot sue in his own name, a ruling which would be abrogated by statute in many States; it is a ruling that no perfect legal title, such as the law merchant recognizes, has been transferred. The transferee has acquired no more than an equitable title; and hence his demand may be defeated by the existence of equities or defences which would be available by the defendant in a suit by the payee, regardless of the rule in whose name he should sue.

The considerations above presented against allowing the guaranty to draw negotiability from the principal contract apply in principle, however general the language of the guaranty towards the holder.² The contract, being a contract of the common law, is incapable of negotiability by any intention of the guarantor, however expressed, so long as his contract is expressed in the language of guaranty. Authorities, however, are not wanting which decline to take this view where the guaranty is by a *third person*, and not by the holder of the instrument; and, while not readily allowing negotiability to a guaranty, allowing it to the guaranty if the language of the guaranty does not restrain it.³ It is probable, however, that the courts which treat such a guaranty as negotiable would not strain the law further by allowing negotiability to a guaranty not written upon the note, bill, or cheque. And it is certain

¹ Belcher v. Smith, 7 Cush. 482; Tuttle v. Bartholomew, 12 Met. 452 (overruling Blakely v. Grant, 6 Mass. 386, and Upham v. Prince, 14 Mass. 14) See Central Trust Co. v. National Bank, 101 U. S. 70; ante, p. 93.

² See note to Dunham v. Patterson, 36 L. R. A. 232.

³ The guaranty of bonds and similar instruments of corporations stands upon a footing of its own. Custom or statute makes the guaranty negotiable in such cases. The text refers only to private written guaranties.

that there could be no such thing as a negotiable guaranty of an unnegotiable instrument.

In regard to the third peculiarity of contracts of the law merchant, grace, no serious question can be raised. The guaranty itself does not draw grace from the law merchant, ^{Guaranty} and is not entitled to grace under any other law, ^{touching grace.} while the contract assured may or may not be. But of course there can be no breach of the guaranty until there is a breach of the principal contract, which cannot occur until the last day of grace, if the principal contract is entitled to grace.

One question more remains: Does a guaranty draw from the negotiable instrument assured the properties of indorsement touching presentment and notice? Those courts ^{Guaranty} which treat the guaranty as practically an indorse- ^{touching pre-}ment for the purpose of negotiability would prob- ^{sentment and}ably be driven to the conclusion that the guarantor would have the right to insist upon all the steps which an indorser could require. Otherwise the contract would be very anomalous; it would be indorsement and not indorsement at the same time.

Those courts, however, which decline to treat a guaranty as the equivalent of an indorsement will find no difficulty now; the guaranty not being indorsement, the steps to fix the liability of an indorser cannot be required to fix the liability of a guarantor. The guaranty stands upon its own footing as a common law contract; what is required touching it in that aspect is now required, and nothing more.

What has been said thus far must be understood as applicable to cases already referred to of anomalous indorsement — 'indorsement' by a stranger to secure the payee — whether such cases are called cases of guaranty or of suretyship.

§ 3. SURETYSHIP (IN SPECIFIC SENSE).

We are now brought to suretyship in the specific sense mentioned in section 1, namely, where the assurance is part and **parcel** of the contract assured. And that subject may be more **shortly** disposed of.

The two engagements now are one, as where the instrument runs, in common form, 'I, A B, as principal, and I, C D, as surety, promise,' etc., or 'We promise to pay,' etc., followed by the signatures 'A B,' 'C D, surety.' And accordingly the consideration which supports the engagement of the principal supports that of the surety; there can be no occasion for any separate consideration to support the latter's contract. But the contract being within the Statute of Frauds, the same doctrine in regard to reference to consideration prevails as in the case of guaranty. Now, however, the contract of principal and surety being one, the only requirement that can be made, in the nature of things, in those States in which there must be a reference to consideration, is in the one contract signed by both principal and surety. It should be noticed in regard to that point that the contract, in such States, may be good against the principal and, for want of reference to consideration, bad against the surety; indeed it would be bad against both if the contract is joint.

No question of course can arise in regard to negotiability. The surety's contract being one with the principal's contract, it is of necessity as much a contract of the law merchant as the principal's contract itself. And the same is to be said in regard to grace, and in regard to presentment and to most other questions.

§ 4. MORTGAGE.

The executed contract of mortgage, assuring an instrument of the law merchant, stands upon a footing of its own. It is an incident of the instrument assured; and if that is negotiable and is transferred according to the law merchant, the mortgage passes with it, ipso facto, without assignment in words, and, by the weight of authority, with the properties of the principal instrument itself.¹ Equities therefore cut off by negotiation of the latter to a holder in due course are cut off as well in respect of the mortgage.¹

¹ *Carpenter v. Longman*, 16 Wall. 271; *Kenicot v. Wayne*, id. 452; *Trust Co. v. Smythe*, 94 Tenn. 513 (citing cases contra); *Clark v. Jones*, 93 Tenn. 639; *Mayes v. Robinson*, 93 Mo. 114; *First National Bank v. Rohrer*, 138 Mo. 369; *Crawford v. Aultman*, 139 Mo. 262, 270; *Wilson v. Campbell*, 110 Mich. 580; *Robinson Seminary v. Campbell*, 60 Kans. 60.

CHAPTER XV.

HOLDER'S POSITION.

§ 1. CHANGE OF POINT OF VIEW: STRENGTH OF PLAINTIFF'S POSITION.

THUS far we have been considering the several particular contracts of the parties liable upon the instrument, in other words the strength of the defendant's position; ^{Nature of} now we are to consider the opposite side, in other ^{subject.} words the strength of the plaintiff's position, a matter which in general affects alike all the particular contracts heretofore under consideration. The subject will relate mainly to mediate (more commonly called remote) as distinguished from immediate parties; that is, mainly to cases in which the holder is separated by at least one link from the defendant, the plaintiff being usually (but not necessarily)¹ either an indorsee, or the payee of a bill of exchange. The plaintiff's right of action is either presumptive or paramount; between any immediate parties it is presumptive, consideration² and right of action both being presumptive; between remote parties it may be paramount. This assumes that the plaintiff's title is regular on the face of the instrument.

¹ The payee of a promissory note *may* legally be in the same position; that is, he may be a holder in due course, taking (for instance by discount) for value and without notice. *Lookout Bank v. Aull*, 93 Tenn. 645; *Jordan v. Jordan*, 10 Lea, 129, 134; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Willet v. Parker*, 2 Met. 608; *Deardorff v. Forseman*, 24 Ind. 481. So of a bill of exchange drawn to the drawer's own order, and sued upon by him. *Merritt v. Duncan*, 7 Heisk. 156; *Lookout Bank v. Aull*, *supra*.

² N. I. L. § 31: 'Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.' The same is true of non-negotiable paper.

§ 2. RIGHT TO SUE MEDIATE OR REMOTE PARTY.

The first thing that calls for remark is that the right of the holder to sue remote parties is a right given by the law merchant in its adoption of the custom of merchants. Presumptive right of holder: strength thereof. That right is as perfect, when the plaintiff holds the paper conformably to the custom, as the right to sue an immediate party can be. And further, as a mere right to sue, that is, leaving out of sight any other question, the right rests upon the same footing substantially as the right of any other plaintiff suing upon a written contract of the common law; possession of the instrument according to the law merchant raises, in favor of the plaintiff, a presumptive right to it, and after maturity a presumptive right of action upon it, a right of action against remote as well as against immediate parties.¹

How significant that right may be, may be seen in the statement that it will support the plaintiff in the face (1) of an admission that he holds the paper only as agent or as trustee for another, for still the law presumes that he holds it rightfully until the contrary is shown; (2) of evidence offered even to show that it is *not improbable* that he holds it as agent for another against whom the defendant has a set-off or a defence. Something more is necessary than evidence showing that it is very likely that the plaintiff has no right to the paper, or right of action upon it, after he has produced it in evidence in court with the presumption of title in his favor and, with that, the

¹ N. I. L. § 66; *Pettee v. Prout*, 3 Gray, 502; *Cases*, 225; *Williams v. Holt*, 170 Mass. 351; *First National Bank v. Green*, 43 N. Y. 298; *Grant v. Walsh*, 145 N. Y. 502, 507; *Limerick Bank v. Adams*, 70 Vt. 132; *Mumford v. Weaver*, 18 R. I. 801; *Sprekels v. Bender*, 30 Oreg. 577; *Middleton v. Griffith*, 57 N. J. 442; *Newmarket Bank v. Hanson*, 67 N. H. 501; *New England Loan Co. v. Robinson*, 56 Neb. 50; *First National Bank v. McKibben*, 50 Neb. 513; *Crosby v. Ritchey*, 47 Neb. 924; s. c. 56 Neb. 336; *Robinson v. Smith*, 62 Minn. 62; *Duerson v. Alsop*, 27 Gratt. 229, 248; *Bedell v. Herring*, 11 Am. St. Rep. 320.

Where two or more parts of a bill of exchange drawn in a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. N. I. L. § 186.

presumption of consideration. For example: The plaintiff in a suit upon a promissory note payable to a certain corporation or bearer offers the note in evidence of his title and right to recover. The defendant denies that the plaintiff is the 'bearer' and owner of the note, alleging that it is the property of said corporation, against which the defendant has, and desires to plead, a valid set-off. The facts are that the plaintiff is the general agent of said corporation, having custody of all notes belonging to it; the corporation is insolvent and has no property; and the stockholders, of whom the plaintiff is one, are liable for its debts. The plaintiff is entitled to recover, and the defendant cannot have the benefit of the set-off; the evidence is not sufficient to rebut the presumption of right in favor of the plaintiff.¹

It matters not indeed that the instrument bears a special indorsement by the holder at the time of the suit; still the holder is presumptively owner and entitled to sue as if there were no such indorsement.² The indorsement has no validity until delivery of the instrument, and meantime the holder has the legal right to strike it out.³ The strength of the holder's position as *indorsee* is seen in still stronger light by the settled rule that proof of want of consideration between the original parties is not enough to affect his right of action. The plaintiff is presumptively a holder for value, before maturity, and without notice of any defence, in other words a holder in due course; want of consideration between the original parties touches no part of the presumption.⁴ Indeed, the plaintiff is presumptively entitled to recover though he took the instrument after maturity.⁵

¹ *Pettee v. Prout*, 3 Gray, 502; *Cases*, 225.

² *Middleton v. Griffith*, 57 N. J. 442; *Sprekels v. Bender*, 30 Oreg. 577.

³ Same cases; *Dugan v. United States*, 3 Wheat. 172; *Pilmer v. State Bank*, 19 Iowa, 112.

⁴ *Crosby v. Ritchey*, 47 Neb. 924; s. c. 56 Neb. 336. Further on a subsequent page.

⁵ *Robinson v. Smith*, 62 Minn. 62.

§ 3. ABSOLUTE DEFENCES AND EQUITIES.

Assuming now that no question of title to or ownership of the paper is raised, the plaintiff's right to recover will depend upon **Explanation of the defence set up, which may be either absolutely or presumptively sufficient.** There are then two classes of defences; the first of which may be called Absolute Defences; the second are called Equities — shortly for Equities-fixed-upon-the-holder.

These terms, however, must not be taken in their ordinary sense; in that sense they would be misleading. Equities are legal defences in the ordinary sense of defences available in suits at law, quite as much as are absolute ones. The term equities applies to a class of defences most of which originally were not available as defences to suits at law on contract, being of the nature of cross-rights of action. The defences at law were few, being simply defensive in nature, such as payment, want of consideration, the Statute of Limitations, usury, and the like. The familiar modern defence of misrepresentation, for instance, was not considered a defence; it admitted a contract, and did not show any discharge; accordingly it was a cross-right, to be sued upon by the injured party.

Such cross-rights were, however, available in chancery, where they were treated as equities. Finally, in the 18th century, the common law courts came to admit them, under the name of recoupment, by way of preventing circuity of action;¹ and the law merchant adopted them under their proper name of equities, and then extended the use of the term to other cases. Accordingly it will be taken here for convenience to embrace all defences not absolute.

An equity may be a perfect and complete defence between immediate parties to it, as where it consists in fraudulent misrepresentation; but at most it is only a presumptive defence against a mediate or remote holder; if the holder took the paper for value and without notice, or (speaking generally) stands upon the rights of another who so took, the 'equity' will not avail. The plaintiff's right of action as a holder in due course is accord-

¹ *Harrington v. Stratton*, 22 Pick. 510.

ingly paramount, and not merely presumptive, in a case of equities.

The meaning given to the two terms, respectively, may then be thus explained: Absolute defences import either want of contract, want of capacity, downright illegality of contract (that is, a contract which the law wholly repudiates), alteration of the original contract, or forgery of indorsement. The Statute of Limitations belongs to the same category. No action can be maintained against a party having such a defence, not even by a holder in due course. Equities, on the other hand, imply the existence of a contract between prior parties, but a contract which is invalid and hence defeasible in whole or in part. Between the parties immediately concerned, and against subsequent holders without value or having notice, these equities are perfect defences; but against a holder in due course they are of no avail.¹

The two subjects must now be considered in detail. First, then, of Absolute Defences. That subject is considered here because it almost always appears in contests in regard to the rights of bona fide holders for value. The question then will be, what are these defences against which not even a bona fide holder for value can recover?

To prevent possible misapprehension, it should be stated that in strictness of language these are not defences at all; for it is incumbent upon the plaintiff to prove the existence of the contract upon which he seeks to recover. The term 'defences,' in the cases about to be considered, is to be taken conventionally; and such use of the term is common enough. Thus, the books speak of the 'defence' of want of consideration in actions upon simple contract, though, apart from any statute, it is for the plaintiff to prove the consideration. But there is better justification for the use of the term in relation to the present subject, because after all the defendant has the laboring oar for the greater part. The plaintiff, who now is usually a bona fide holder for value, makes a *presumptive* case easily, as we have seen, and then the defendant must do what he can to save himself.

¹ *Cristy v. Campau*, 107 Mich. 172.

CHAPTER XVI.

ABSOLUTE DEFENCES.

§ 1. DELIVERY : ESTOPPEL.

WE have elsewhere seen that the defendant's signature to the instrument does not of itself make him liable ; he must have delivered the instrument. We have also seen that he may have done that by intention, by agency, or by negligence, and in no other way.¹ But we have also seen that the defendant may have estopped himself to deny that he has delivered the instrument.² This he may have done by words or acts ; but only in favor of a holder in due course. This then is the place for considering that subject.

The most obvious case of an estoppel upon the defendant to deny delivery by himself would be where by statements made to the plaintiff or to some prior holder of the instrument, ignorant of the facts, he had induced such person to purchase the paper as valid against himself. It would not be necessary for him to state, or in any way represent, that he had *delivered* the instrument ; enough that he has represented that he is liable upon it, for that imports that he has delivered it. And if the representation be without qualification, the effect will be that the defendant will be estopped to say that the delivery was conditional, except as his contract itself may have been conditional.

But conduct as well as statements may have the same effect. Possibly delivery by negligence, or by agency in violation of instructions, may be considered examples of estoppel ; but the better view, it seems, is to treat such cases as cases of true delivery and not as cases of estoppel,

¹ Ante, pp. 13-15.² Ante, p. 15.

which imports that, as a mere matter of fact, there may have been no delivery.

No estoppel of the kind however, whether from words or acts, can arise except in favor of a holder in due course, that is, a bona fide holder for value, and without notice of the facts; unless the estoppel amounts to an undertaking like a warranty, not to contest liability at all towards any one.¹ But whether the *defendant* knew the real state of things would no doubt be immaterial, if the representation was made to a holder in due course. The defendant would doubtless be bound to know the facts.²

It will not be enough to create an estoppel that the defendant has done or omitted something which has enabled another to put the instrument into circulation, as might be the case from merely executing and signing the instrument, or writing an indorsement upon it. Thus it is laid down that where a negotiable instrument is stolen or fraudulently taken from the acceptor or maker, such party cannot be required to pay it to any holder whatever; and that too though the acceptor or maker may have made the theft or fraud easy by putting the paper in an unlocked drawer in a desk to which clerks and servants and others had access.³ For example: The plaintiff is bona fide holder for value of a promissory note signed by the defendant, and now sued upon. A third person fraudulently obtains it from the defendant upon the false representation that he is taking something else, and puts it into circulation. The defendant is not liable; there has been no delivery by him or by any act attributable to him, nor is the defendant estopped to say so.⁴

The doctrine of estoppel should never, it is well laid down, be

¹ As to ignorance of the facts by the person to whom the representation is made see Bigelow, Estoppel, 626-628, 5th ed.

² See *id.* 609-626.

³ *Baxendale v. Bennett*, 3 Q. B. Div. 525.

⁴ See *Burson v. Huntington*, 21 Mich. 415; *Cases*, 227; *Gibbs v. Linabury*, 22 Mich. 479; *Chapman v. Rose*, 56 N. Y. 137; *Kellogg v. Steiner*, 29 Wis. 626; *Corby v. Weddle*, 57 Mo. 452; 1 Bigelow, Fraud, 618, 619. But see N. I. L. § 23, where a doubt has been created.

invoked without necessity. It should be applied only in cases where the person against whom it is set up has so conducted himself, in what he has done or omitted, that, unless estopped, he would be doing something contrary to his former conduct, in what he then did or omitted. That principle does not apply to a case of theft or the like, even though the party stolen from was negligent; for theft is not the natural consequence of negligence, though the negligence make it possible;¹ unless perhaps the theft were by one's servant whom one knew or had reason to suppose dishonest.² Nor in any case of negligence, even without theft or other criminal or fraudulent act, does estoppel apply unless the negligence was in or in immediate connection with putting the paper into circulation;³ the negligence must have been the *cause*, the proximate, legal cause, of what happened.⁴ For example: The defendant executes a promissory note payable to the order of A, and leaves the same on his table before A and B, while he (the defendant) goes out of an errand, saying to A that he must not take the note. In violation of this prohibition A takes the note, carries it off, and indorses it to the plaintiff for value and without notice. The defendant is not liable; he is not estopped to deny delivery of the note.⁵

The statement then sometimes found even in books of the law merchant, that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such third person to bring about the loss must bear the loss, is too broad,⁶ as will more fully be seen further on. The statement indeed, like many another started when judges were feeling after the law, 'if

'One of two
innocent per-
sons.'

¹ Baxendale v. Bennett, *supra*, Bramwell, L. J.

² Even then there would be no liability where the dishonest servant *forged* his employer's signature, though the employer might by due care have known that he was dishonest. *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516. See post, p. 220.

³ See *Arnold v. Cheque Bank*, 1 C. P. D. 578, and other cases ante, p. 15.

⁴ See *Bank of England v. Vagliano*, 1891, A. C. 107, 135, and other cases ante, p. 15.

⁵ *Burson v. Huntington*, *supra*. But qu. if defendant was negligent?

⁶ See *Arnold v. Cheque Bank*, *supra*.

happily they might find it,' is a dangerous one, so much so that the danger fairly overbalances its usefulness.

§ 2. WANT OF CONTRACT: FRAUD IN ESSE CONTRACTUS.

Fraud in esse contractus, as we use the term, is fraud by which legal agreement itself in the supposed contract was prevented.¹ The case is to be distinguished sharply from fraud in its more common form of misrepresentation of facts touching the inducement or desirability of the contract, or the fraud of an agent in wrongfully filling up and delivering a blank instrument signed by his principal. That sort of fraud does not prevent contract; it only makes a case in which it is or may be probable that there would have been no such contract as took place, had the state of things been known by the defendant, or had the instrument been under his control at the moment. Fraud of that kind creates an equity only, not an absolute defence.

This kind of fraud distinguished.

Fraud in esse contractus may be committed in any of the various contracts with which we are concerned, and in a variety of ways; enough that assent to the particular alleged contract was never given. One of the forms which fraud of the kind assumes is misrepresentation (not of facts of inducement, but) of the very kind of contract which the party is induced to sign, or by the substitution, unperceived or misunderstood by such party, of the paper he intended to sign for another which he did not intend to sign. For example: The plaintiff is bona fide holder for value of a bill of exchange, upon which there is an indorsement in the handwriting of the defendant, upon which indorsement the suit is brought. The defendant, a man advanced in years, is induced to write his name upon the back of the bill by the fraud of the acceptor in telling the defendant that the contract he is signing is a guaranty; only the back of the paper being shown. The defendant had previously signed a guaranty at the request of the same person, for the same purpose and

Misrepresentation of nature of contract.

¹ See *Willard v. Nelson*, 35 Neb. 651; s. c. 37 Am. St. Rep. 455 and note.

amount, and he is now led to suppose that he is signing a similar guaranty to the former one (out of which no liability resulted). There has been no negligence by the defendant. The plaintiff is not entitled to recover, the defendant having been deceived, not in respect of the legal effect, but of the actual contents of the instruments.¹

That shows again that the statement that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such third person to bring about the loss must bear the loss, can only be accepted with important qualifications.² The proposition is too broad even in cases of negligence, as was seen in speaking of delivery; and in the example last given there was not even negligence. The burden of the loss cannot be shifted over to the shoulders of one who never contracted, though his act or conduct may have been the occasion, assuming that it was not the cause, of the loss.

'One of two innocent persons.'

§ 3. WANT OF CONTRACT: ALTERATION: FORGERY OF SIGNATURE: ESTOPPEL.

Another case of want of contract arises where there has been a material, unauthorized alteration of the instrument to which the defendant gave his signature. The authorities on the unwritten law in general declare that to alter materially the terms, written or printed, of a negotiable note, bill, or cheque, after the defendant's signature was written to it, is to destroy its validity against him, even in the hands of a holder in due course, so that no action can be maintained upon it even in its original form. The reason is plain. The altered instrument

¹ *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Cases*, 237. Compare certain *statutory* cases of tricks or devices by which men have been induced by travelling agents for patent-rights and other things to sign promissory notes. *Champion v. Ulmer*, 70 Ill. 320. See *Gibbs v. Linabury*, 22 Mich. 479.

² If that statement were true, a man might be held as maker of a promissory note who had merely written his name upon a blank sheet of paper which another had afterwards fraudulently filled out as a promise to pay money. Of course no liability towards any one could be created in such a case. See *Cline v. Guthrie*, 42 Ind. 227; *Caulkins v. Whisler*, 29 Iowa, 495.

is not the one he signed; and the identity of the one signed has been destroyed.¹

A material alteration within the meaning of the rule stated may be defined thus: Any alteration (1) changing the legal effect of the instrument, (2) made with such intent and having become final, (3) without consent, (4) by a party to it, or by one in lawful possession or custody of it, is a material alteration. The divisions of the definition as here given will serve as the basis of an analysis of the subject.

First, then, of alterations 'changing the legal effect of the instrument.' It was at one time considered, and it is still occasionally intimated, that a *fraudulent* alteration, material or not, would destroy the instrument, Immaterial alteration. perhaps as a sort of penalty for the wrongful intent;² but that doctrine has been generally abandoned. An immaterial alteration then cannot, by the current of authority, or under the Statute,³ have the effect to prevent recovery upon the paper. For example: The plaintiff is holder for value, and the defendant maker, of a promissory note sued upon, which does not state any time of payment. The plaintiff afterwards writes

¹ *Wade v. Withington*, 1 Allen, 561; *Draper v. Ward*, 112 Mass. 315; *Aldrich v. Smith*, 37 Mich. 468. See *Woodworth v. Bank of America*, 10 Am. Dec. 239 and note; *Slater v. Moore*, 86 Va. 26; *Bachelor v. White*, 80 Va. 103; *Citizens' Bank v. Williams*, 174 Penn. St. 66; *Gettysburg Bank v. Chisholm*, 169 Penn. St. 564; *Newman v. King*, 54 Ohio St. 273; *Cronkhite v. Nebeker*, 81 Ind. 319; *Charlton v. Reed*, 61 Iowa, 166. To alter materially a memorandum made part of the instrument, on the same paper or a paper annexed, has the same effect as the alteration of the instrument itself, so long as the connection between the two is preserved. *Meade v. Sandidge*, 9 Texas Civ. Ap. 360; *Tuckerman v. Harwell*, 14 Am. Dec. 232, note. See post, p. 221.

² See *McDaniel v. Whitsett*, 96 Tenn. 10, as quoted *infra*, p. 211, note; *Pigot's Case*, 11 Coke, 27 a, comment on 2d resolution. The word 'fraudulent' is not used there; but in its application to *immaterial* alterations, the language must, it seems, be understood as referring to a fraudulent intent. 'If the obligee himself,' as Coke comments in the passage referred to, 'alters the deed . . . although it is in words not material, yet the deed is void.'

³ N. I. L. § 131: 'Where a negotiable instrument is materially altered . . . it is avoided,' etc.

in the words 'on demand,' without the defendant's consent and with fraudulent intent. The plaintiff is entitled to recover notwithstanding the alteration, the note being originally payable on demand in legal effect.¹ Again: The plaintiff is holder for value of an instrument made by the defendant, promising to pay a certain sum of money, upon a condition expressed therein, to a person named. The payee afterwards writes in the words 'or bearer' without the defendant's consent. The defendant's liability remains unchanged; the contract, being incapable of negotiability as it was executed, could not be made negotiable by adding the words in question.²

A like case would be made where, after a change of law not governing the instrument in question, an alteration in it is made expressing no more than what was embraced in the law by which the instrument was governed.³ Another case of the kind would arise where an alteration was made conforming to the true understanding of the parties, correcting a mistake in the writing.⁴ So to add the words 'with grace' to paper entitled by law to grace, or 'without grace' to paper not entitled to grace; and so to add the legal rate of interest, as 'at six per cent,' after the words 'with interest,'—such additions are immaterial; they have no effect upon the validity of the instrument. In such cases it makes no difference whether the defendant has consented to the alteration or not; and so of all other cases in which the alteration is immaterial.

It would be difficult to show what alterations are such as to change the legal effect of the instrument, in any other way than by specific cases. And then too it should be remembered that we are dealing with but part of the definition, and that all the other parts of it must also be met to make a material alteration.

¹ *Aldous v. Cornwell*, L. R. 3 Q. B. 573, overruling *Pigot's Case*, 2d resolution. See *Goodenow v. Curtis*, 33 Mich. 505; *Curtis v. Goodenow*, 24 Mich. 18. But see *Bridges v. Winters*, 42 Miss. 135.

² *Goodenow v. Curtis* and *Curtis v. Goodenow*, *supra*.

³ *Bridges v. Winters*, 42 Miss. 135.

⁴ *McRaven v. Crisler*, 53 Miss. 542; *Clute v. Small*, 17 Wend. 238; *Harvey v. Harvey*, 15 Maine, 357. But see *Miller v. Gilleland*, 19 Penn. St. 119, by a divided court.

In other words, though in a particular case the alteration appears to change the legal effect of the instrument, it may appear that it was not 'made with such intent and having become final,' or one of the other facts may be wanting to make it material.

The following are some of the cases in which the alteration changes, or appears to change, the legal effect of the instrument: An alteration of the date of the instrument;¹ changing 'I promise' to 'we promise,' for such change would convert a several, or a joint and several, into a joint promise;² the addition of an interest clause to an instrument completed without it,³ as for example, 'to bear legal interest,'⁴ or 'interest payable annually' or 'semi-annually,' 'quarterly' or otherwise;⁵ striking out the words 'after maturity' where interest is made so payable;⁶ changing the name of the payee;⁷ changing 'to the order of A' to 'to A or bearer,'⁸ or to the 'holder';⁹ changing the place of payment,¹⁰ as by adding the words 'payable at the Bank of S,' if the instrument before was not payable there,¹¹ though it seems that an acceptor may make a bill payable at no designated place payable at any particular place he will within

¹ N. I. L. § 132, 1; *Newman v. King*, 54 Ohio St. 273; *Vance v. Lowther*, 1 Ex. D. 176; *Wood v. Steele*, 6 Wall. 80; *Britton v. Dierker*, 46 Mo. 591; *Emmons v. Meeker*, 55 Ind. 321; *Kennedy v. Lancaster Bank*, 18 Penn. St. 347.

² *Humphreys v. Gwillow*, 13 N. H. 385; N. I. L. § 132, 4.

³ *Holmes v. Trumper*, 22 Mich. 427; *Cases*, 258; *Glover v. Robbins*, 49 Ala. 219; N. I. L. § 132, 2. Perhaps not to add 'with interest after maturity,' where nothing is said about interest in the instrument. As to filling blanks in such cases, see *infra*.

⁴ *Lochnane v. Emmerson*, 11 Bush, 69; *Gettesburg Bank v. Chisholm*, 169 Penn. St. 564.

⁵ *Marsh v. Griffin*, 42 Iowa, 403; *Blakey v. Johnson*, 13 Bush, 197; *Lamar v. Brown*, 56 Ala. 157.

⁶ *Brooks v. Allen*, 62 Ind. 401.

⁷ *Stoddard v. Penniman*, 108 Mass. 366; s. c. 113 Mass. 386.

⁸ *Union Bank v. Roberts*, 45 Wis. 373; N. I. L. § 132, 3.

⁹ *McDaniel v. Whitsett*, 96 Tenn. 10.

¹⁰ *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21.

¹¹ *Southwark Bank v. Gross*, 35 Penn. St. 80; *Nazro v. Fuller*, 24 Wend. 374; *Whitesides v. Northern Bank*, 10 Bush, 501; *Burchfield v. Moore*, 3 Fl. & B. 683.

the town in which by law it is payable;¹ adding another name to that of the maker of a note,² though the case appears to be different where another surety is added, upon delivery, to a note or bill already executed by a surety;³ adding an attestation clause, for that produces a possible and probable change in the evidence of execution, proof of the signature of the attesting witness being ordinarily essential to prove the execution;⁴ changing the sum payable whether principal or interest,⁵ or the medium or currency in which payment is to be made.⁶

‘Made with such intent and having become final.’ The alteration may have been fraudulent, or due to accident or mistake.

Correcting mistake. It is presumptively fraudulent, it seems, if it was material.⁷ Presumptively then the instrument is destroyed by a material alteration, and destroyed fraudulently. But it may be that the alteration was the result of an accident, as where the intention was to make the change in another instrument; or it may be due to mistake in regard to the terms of agreement, or in computation of amount, or in some other particular. When that is the case, the instrument is not necessarily destroyed.⁸ Thus if the holder has by mistake struck

¹ *Troy Bank v. Lauman*, 19 N. Y. 477. See *Todd v. Bank of Kentucky*, 3 Bush, 626; *Whitesides v. Northern Bank*, supra; of the right of an accommodation acceptor of a bill payable generally to designate a particular place of payment.

² N. I. L. § 132, 4; *Hamilton v. Hooper*, 46 Iowa, 515; *Lunt v. Silver*, 5 Mo. App. 186; *Haskell v. Champion*, 30 Mo. 136; *Crandall v. First National Bank*, 61 Ind. 349; *Wallace v. Jewell*, 21 Ohio St. 163; *Gardner v. Walsh*, 5 El. & B. 83.

³ *Crandall v. First National Bank*, supra; *Keith v. Goodwin*, 31 Vt. 268, distinguishing *Gardner v. Walsh*, supra, and like cases, on the ground that the addition was made after the instrument had been delivered.

⁴ *Adams v. Frye*, 3 Met. 103.

⁵ N. I. L. § 132, 2.

⁶ Id. § 132, 5.

⁷ See note infra, p. 211, as to *McDaniel v. Whitsett*, supra.

⁸ N. I. L. § 130; *Wilkinson v. Johnson*, 3 Barn. & C. 428; s. c. 27 Rev. Rep. 393; *Decker v. Franz*, 7 Bush, 273; *McRaven v. Crisler*, 53 Miss. 542; *Harvey v. Harvey*, 15 Maine, 357. See *Johnson v. Johnson*, 66 Mich. 525; *Citizens' Bank v. Williams*, 174 Penn. St. 66. But see *Newman v. King*, 54 Ohio St. 273, putting the contrary on grounds of public policy. The suit was by an indorsee upon a promissory note.

out an indorsement, he has not lost his right against the indorser.¹ Or if new words have merely been added to the instrument by mistake, they may in principle be struck out by the one who added them, on discovering the mistake; or if they are written over an erasure of the original words, and the original words cannot well be restored, they may stand, and the explanation be given at the trial.² In the case of mistake there is then a locus penitentiæ before the act becomes final.

The right to make such correction appears however to be limited to the person who made the change, including possibly his agents and personal representatives. After the instrument has passed from his hands it is too late; for his indorsee will have taken it as altered, and the only right he can have is upon the altered paper. He did not take it as it stood originally, and hence cannot restore it to its original form even where that would be physically practicable. The alteration has been allowed to stand by the party who made it, and so has permanently changed the paper; it has become 'final.' Nor would it make any difference, it seems, that the party who made the alteration did not discover his mistake until after he had transferred the instrument; after transferring it, his rights over it are gone.

The difference between material alterations made by mistake, and material alterations made simply with intent to change the legal effect of the instrument, is plain; Mistake distinguished. in the case of mistake, the object of the act is to restore the writing to the terms agreed upon; in the case of intention simply to change, the object virtually is to destroy the writing as evidence of the terms actually agreed upon. One who has made a fraudulent and material alteration is accordingly bound at once by his act, and cannot recall it.³ And he

¹ *Wilkinson v. Johnson*, 3 Barn. & C. 428; s. c. 27 Rev. Rep. 393.

² Compare *Horst v. Wagner*, 43 Iowa, 373; *Krause v. Meyer*, 32 Iowa, 566.

³ *McDaniel v. Whitsett*, 96 Tenn. 10. The rule as to alteration, it is here laid down, 'imports a fraud when it is material, whether so intended or not; and even if no injury is done and the change abandoned by the party in whose favor it was intended to operate, the consequence is the same.' The rule is

can neither sue upon the instrument nor recover the consideration he may have given for it, or the debt as such for which the instrument was given.

The distinction stated will serve to explain *some* of the apparent contradictions of the authorities. Thus, it is laid down that a material alteration by a party will destroy the instrument whether it was fraudulent or not;¹ and it is also laid down that a material alteration will *not* destroy the instrument if it was not fraudulent.² Both statements are true. The case usually presented is one in which the alteration was suffered to remain, and the paper passed as altered to the plaintiff. The alteration is final, and authority conforms to principle, that the plaintiff, though a holder in due course, cannot maintain an action in such a case against any of the non-consenting parties who signed the paper as it stood before the alteration. For example: The plaintiff is payee for value of what purports to be a promissory note signed by the defendants. The instrument originally read: 'For value received *I* promise to pay,' etc., 'with interest,' and so was signed by two persons, the defendants. The note thus executed was for the benefit of the first signer, who afterwards changes the word '*I*' to '*we*,' and adds after the word '*interest*' the words '*at twelve per cent*,' without the other defendant's knowledge, supposing himself to have the right to do so, the rate of interest not having been agreed upon when the note was executed, but being afterwards fixed between the first defendant and the plaintiff as inserted. Then the instrument so altered is delivered to the plaintiff. The plain-

intended to operate as a penalty against the party making the alteration as well as a protection to the other party. *Id.* Perhaps the language quoted is rather too strong. It seems sufficient to say, as has been said in the text, that a material alteration is presumptively fraudulent.

But it seems clear that when there is, in fact, a fraudulent intent, or any intent to destroy, accompanying the alteration, the act is final; for after A has discharged B from contract he cannot revive B's liability without his consent any more than he could create the liability without his consent. Nor is it necessary to the completion of the act that B should have notice of it. An indorser can be discharged by simply striking out his name.

¹ *Draper v. Ward*, *supra*.

² *Kountz v. Kennedy*, 63 Penn. St. 187.

tiff is not entitled to recover against the second defendant, either upon the instrument in its altered or by the unwritten law in its original form, though the alteration was not fraudulent.¹

Hence, the first of the two apparently contradictory propositions is true. But the party having made an innocent mistake, in making the alteration, may, while the instrument is still in his own hands, discover his mistake and desire to correct it, restoring the instrument to its original state. The alteration not having become final, that may be done, or the case may be treated as if it had been done, or as if no alteration had been made, if actual restoration is impracticable. Hence, the second of the two propositions also is correct. This explanation may not indeed align with some of the authorities, for the second proposition has misled the courts in some cases, causing them to hold in general that material alterations which are not fraudulent are not fatal to the instrument; but the explanation, it is believed, shows a sound distinction.

The general rule then may be expanded and stated thus: If the bill, note, or cheque be altered in a material particular, either by fraud or by an innocent mistake not corrected while the paper is in the hands of the ^{Rule expanded and stated.} party who made the alteration, it will be, by the unwritten law merchant, destroyed towards all non-consenting parties, and that too whether the alteration was made by the party claiming under it or by any other party to it. And no action can be maintained against non-consenting parties, either upon the altered instrument or (by the unwritten law) upon the instrument as it stood before alteration, even by a bona fide holder for value.² The fact that the instrument may have been restored to its original form (after having been passed with the alteration) makes no difference.³ Nor is the alteration to be

¹ *Draper v. Ward*, *supra*.

² See besides the cases *supra*, *Smith v. Mace*, 44 N. H. 553; *Holmes v. Trumper*, 22 Mich. 427; *Cases*, 258; *Greenfield Bank v. Stowell*, 123 Mass. 196; *Citizens' Bank v. Richmond*, 121 Mass. 110; *Woolfolk v. Bank of America*, 10 Bush, 504, 517; *Morehead v. Parkersburg Bank*, 5 W. Va. 74; *Burchfield v. Moore*, 3 El. & B. 683.

³ *Citizens' Bank v. Richmond*, *supra*.

deemed immaterial by reason of the fact that it is against the interest of the one making it and favorable to the other,¹ for still its legal effect is changed, and the identity of the contract signed is destroyed.² But such an alteration rebuts any presumption of fraud.³

The Statute has changed the unwritten law to this extent, that a holder of the instrument in due course, not a party to the alteration, may enforce payment of it according to its original tenor.⁴

‘Without consent.’ Consenting parties cannot set up an alteration;⁵ and, among others, all who have signed the contract after the alteration are in effect consenting parties;⁶ with one exception to be stated presently. Thus, if an alteration in the date of a bill of exchange was made with the consent of the acceptor, or if he subsequently assented to it, he will be bound, and so will all other parties to it becoming such after the alteration; while the prior non-consenting parties may repudiate the instrument.⁷

¹ *Humphreys v. Gwillow*, 13 N. H. 385, 387.

² *Id.*; *Draper v. Ward*, 1 Allen, 561; *Chism v. Toomer*, 27 Ark. 108.

³ *Keene v. Aldrich*, 19 R. I. 309, 311; *Whitmer v. Fry*, 10 Mo. 349; *Wheelock v. Freeman*, 13 Pick. 165; *Robinson v. Reed*, 46 Iowa, 219. The result is that the party who made the alteration may sue on the debt for which he received the instrument against those who received the consideration. *Keene v. Aldrich*, *supra*; *Booth v. Powers*, 56 N. Y. 22, 31; *Matteson v. Ellsworth*, 33 Wis. 488; *Hunt v. Gray*, 35 N. J. 227, 234.

⁴ N. I. L. § 131. So in Pennsylvania regardless of statute, if the alteration was not such as to excite suspicion. *Worrall v. Gheen*, 39 Penn. St. 388; *Cases*, 256; *Garrard v. Haddan*, 67 Penn. St. 82; *Phelan v. Moss*, *id.* 59. See also *Brown v. Reed*, 79 Penn. St. 370; *Neff v. Horner*, 63 Penn. St. 327.

⁵ *Jacobs v. Gilreath*, 45 S. C. 46.

⁶ N. I. L. § 131: ‘Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But’ a holder in due course may sue upon the instrument in its original form.

⁷ *Paton v. Winter*, 1 Taunt. 420; *Tarleton v. Shingler*, 7 C. B. 812.

The exception referred to arises in the acceptance of a bill of exchange. A bill may have been altered after it left the drawer's hands and before acceptance; in such a case, though the acceptor appears to have accepted the bill in its altered form, he has not done so in law, — he has presumably intended to accept the bill which the drawer drew. If he accepted the bill without notice of the alteration, and without negligence, he is not bound by his act. For example: The defendants being bona fide holders for value of a bill of exchange drawn upon the plaintiffs, the bill is presented to the plaintiffs for acceptance, and accepted, an alteration of the sum payable, of the date, and of the payee's name, having been made in it after it passed from the drawer's hands and before acceptance. The acceptance was without notice of the alteration and without negligence. Afterwards the plaintiffs pay the bill, and then on discovering the alteration bring the present suit to recover back the sum paid. They are entitled to recover.¹

The reason is plain. The drawee of a bill of exchange accepts if he does accept, on the ground that payment by him gives him the right to charge the amount to the drawer as payment made upon the drawer's order;² he would not accept except upon that footing, or upon the undertaking of some one else to protect him. But where the bill is altered after it has left the drawer's hands, the acceptor cannot on payment make such charge; the drawer has not directed him to pay the altered bill. Acceptance, then, is not, in such cases as the foregoing, an admission of the genuineness of the *contents* of the bill, so as to work an estoppel against him in favor of a holder in due course.

If, however, the drawer himself has altered the bill *before* acceptance, or consented to the alteration of it, after drawing it, the case will be different, for he will then have directed the drawee to accept and pay the bill as

¹ Compare *Bank of Commerce v. Union Bank*, 3 Comst. 230, bill paid at sight. See *Clews v. Bank of New York*, 89 N. Y. 418. Acceptance is an admission of the drawer's hand (as will be seen later), but not of the rest of the writing. Id.

² Compare the language of the court in *Hortsmann v. Henshaw*, 11 How 177.

altered.¹ That distinction must be taken as the explanation of one or two cases which at first may seem to hold broadly that acceptance of an altered bill makes the acceptor liable upon the bill as altered. For example: The plaintiff is payee of a bill of exchange accepted by the defendant and now sued upon. The bill as originally drawn was payable three days after date, and in that condition was indorsed by the payee (the plaintiff) for the accommodation of the drawer, who now changes the word 'three' to 'thirty,' and passes the bill to A. The fact is afterwards discovered, and an arrangement made by which the bill is returned by A to the plaintiff; then it is accepted by the defendant without knowledge or notice of the alteration. The defendant is liable.²

'By a party to it or by one in lawful possession or custody of it.' An alteration made by a stranger has no effect upon the validity of the instrument if it is possible to show what its language was before the act; the alteration must be made by a party, or by one in lawful possession or custody, — all others are strangers, — in order to destroy the instrument.³ By a 'party' is meant any one who has placed his signature to it, or has been owner of or interested in the instrument; by 'one in lawful possession or custody,' any one to whom the owner or other person interested in the instrument has intrusted it.⁴

If a blank has been wrongfully filled by one who has been

¹ If the drawer altered the bill *after* the acceptance, it would make no difference that the acceptor on payment could charge the sum paid against the drawer. *Scholfield v. Londesborough*, 1894, 2 Q. B. 660; s. c. 1895, 1 Q. B. 536, and 1896, A. C. 514. The point however was assumed, the decision being on other grounds.

² *Ward v. Allen*, 2 Met. 53. There were other complicating facts in this case, but they have no bearing upon the point now under consideration. The first head-note of the case is too broad. In *Langton v. Lazarus*, 5 Mees. & W. 629, also, the alteration was made by the drawer. That must be understood as the essential fact in reference to the acceptor's liability.

³ *Langenberger v. Kroeger*, 48 Cal. 147; *Brooks v. Allen*, 62 Ind. 401; *Ætna Ins. Co. v. Winchester*, 43 Conn. 391.

⁴ See *Brooks v. Allen* and *Ætna Ins. Co. v. Winchester*, *supra*.

intrusted with the instrument, with power to fill the blank or not in a certain contingency, the act will not constitute a material alteration, though the paper was delivered as complete. The case is one of agency, and the party whose confidence has been betrayed, that is, the principal, will be bound in favor of a bona fide holder for value.¹ That assumes, however, that no alteration of the written or printed language is made,² unless the facts indicate an authority to alter.³

The mere fact that one who has been acting as authorized agent of the defendant made the alteration will not bind the supposed principal, for agency confers no authority to commit a crime.⁴ No relation of agency exists between co-signers as such of an instrument; and hence an alteration made by one co-maker of a promissory note, without the consent of the others, though before delivery, if the other makers have already signed, is a destruction of the instrument towards the latter.⁵

Thus far of the meaning of the term 'material alteration.' But suppose that the defendant, being maker of a completed promissory note, or drawer of a completed bill of exchange or cheque, has facilitated the alteration, as for example, by leaving a blank space in the instrument, which has afterwards been fraudulently filled out, is he now estopped or barred from setting up the alteration? It must be understood that the case under consideration is one in which the instrument left the hands of the maker or drawer as a complete instrument; cases of intrusting one's blank signature, or one's signature to an uncompleted instrument, stand upon a very different footing, as we have just seen.

It has sometimes been held that if the maker or the drawer, by leaving a blank, has made it easy for the wrong-doer to fill

¹ *Belknap v. National Bank*, 100 Mass. 376, 381; *Greenfield Bank v. Stowell*, 123 Mass. 196, 203.

² *Belknap v. National Bank*, *supra*.

³ *Ætna Ins. Co. v. Winchester*, 43 Conn. 391.

⁴ *Id.*; *Brooks v. Allen*, 62 Ind. 401.

⁵ *Wood v. Steele*, 6 Wall. 80; *Greenville Bank v. Stowell*, 123 Mass. 196; *Wood v. Draper*, 112 Mass. 315.

the blank and so alter the instrument, he, rather than the bona fide holder for value, must bear the loss. That is commonly put upon the ground of (supposed) negligence, sometimes upon the ground that of two innocent parties, he who occasioned the loss must bear the loss. The last is, at best, but a very imperfect statement of law, and cannot be taken as satisfactory in any such case; and the first, the ground of negligence, finds an answer in what has been said already in regard to delivery, — to wit, the negligence, if it be admitted that there is negligence, is not the legal, otherwise called the proximate cause, in ordinary cases, of the alteration. To be the legal cause of what was done, the negligence must have been in or in immediate connection with the alteration; the alteration must have been the natural or the probable result of the negligence.¹

Though there are then cases to the contrary,² it may be safely stated that in principle, and by the weight of authority, a material alteration by a party, or by one in lawful possession, made in a note, bill, or cheque delivered as a completed instrument by writing or printing words in a blank space, destroys the instrument according to unwritten law merchant, so that no action can be maintained against the maker or drawer, or other non-consenting parties, even by a bona fide holder for value.³ Nor does it make any difference whether the blank was left in the body or at the end of the instrument. For example: The plaintiff is a bona fide holder for value of a promissory note sued

¹ In a case of the fraudulent transfer of stock by the plaintiffs' clerk, *Bowen, L. J.*, said: 'The proximate cause' — that is, the legal cause — 'was the felony and crime' of the clerk, 'and it cannot be said that the felony was either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs.' *Merchants of the Staple v. Bank of England*, 21 Q. B. Div. 160. See also *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389; *Swan v. North British Co.*, 2 Hurl. & N. 175, 182; *Arnold v. Cheque Bank*, 1 C. P. Div. 578; *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516; *Bigelow, Estoppel*, 655, 656, 5th ed.

² *Isnard v. Torres*, 10 La. An. 103; *Capital Bank v. Armstrong*, 62 Mo. 59; *Iron Mountain Bank v. Murdock*, id. 70; *Ridington v. Woods*, 45 Cal. 406. See also *Worrall v. Gheen*, 39 Penn. St. 388; *Cases*, 256.

³ *Holmes v. Trumper*, 22 Mich. 427; *Cases*, 258; *Greenfield Bank v. Stowell*, 123 Mass. 196, and cases reviewed therein.

upon, purporting to have been signed by the defendant as maker, and containing at the end the words '10 per cent.' What the defendant did sign was the instrument in question without those words, delivering the same as a completed undertaking. The instrument signed closed with the words, 'with interest at,' after which there was a blank, which after delivery to the payee was filled in with the words above quoted, '10 per cent.' The defendant is not liable, the alteration having the effect to destroy the instrument.¹

The contrary view, which has found favor in some of our courts, appears to have been based originally upon a misunderstanding of the effect of a decision of the English Common Pleas in relation to a blank space left in a cheque just before the amount for which the cheque had been made payable; the drawer's clerk, *by whom* the cheque was drawn, and to whom the cheque was then intrusted to obtain payment, having raised the sum payable by writing certain words in the blank.² But the contest there was between the drawer of the cheque and his banker, the drawee; no case arose of the claim of a holder in due course, and though it was held that the drawer must under the circumstances bear the loss, nothing was said about estoppel. Moreover there was something approaching agency in the facts.³

The case referred to is, therefore, no authority for the position upon which some courts have acted, that the drawer of a cheque or bill, or the maker of a note, is estopped or barred from setting up the alteration in a suit by the holder of the instrument. The English courts, followed by some of the ablest of our own, have plainly repudiated the idea of any estoppel, and have declared that the decision must be understood as confined in its bearing to questions arising upon facts of the same nature; that is, to what is called mandate. Final English authority has determined that neither the drawer nor the acceptor of a bill owes any duty to future holders to leave no spaces blank in the instru-

¹ *Holmes v. Trumper*, supra. See also *McGrath v. Clark*, 56 N. Y. 34. But see *Redlich v. Doll*, 54 N. Y. 234, and quære.

² *Young v. Grote*, 4 Bing. 253.

³ See *Holmes v. Trumper*, supra; *Greenfield Bank v. Stowell*, supra.

ment.¹ The case under consideration, if to be regarded as rightly decided,² is clearly distinguishable from cases such as we have been considering.³

It has well been questioned whether the leaving of blanks can ordinarily amount to negligence at all, not to say negligence the legal cause of the loss ; for it is impracticable to execute an instrument, in ordinary business, without leaving blanks some-

¹ The point is thus set at rest by the House of Lords in *Scholfield v. Londesborough*, 1896, A. C. 514, affirming 1895, 1 Q. B. 536, and 1894, 2 Q. B. 660. The notion of negligence is expressly repudiated by their lordships. A fortiori there is no duty resting upon the holder of a cheque to see that his clerk does not forge the holder's name and then pass the cheque. *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516. 'He has the right to assume that his clerk will not commit a crime.' *Id.* *Barker, J.*, at p. 528. This was said of a clerk who by due care might have been known to be dishonest, and who was dishonest. 'We are of opinion,' said the court, 'that the holder of an unindorsed cheque, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the cheque shall be kept, or to whom he shall commit its custody, or to see to it that the cheque shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion.' *Barker, J.*, at p. 528. See *Swan v. North British Co.*, 2 Hurl. & C., 175, 189, 190 ; *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, 192 ; *Arnold v. Cheque Bank*, 1 C. P. Div. 578, 587, 588 ; *Greenfield Bank v. Stowell*, 123 Mass. 196, 200, 201 ; *Holmes v. Trumper*, 22 Mich. 427 ; *Cases*, 258 ; *Fordyce v. Kasminski*, 4 Am. St. Rep. 18 and note ; *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 897, note ; *Burrows v. Klunk*, 14 Am. St. Rep. 371.

² English judges have well spoken of *Young v. Grote* as a fountain of bad law. *Scholfield v. Londesborough*, 1895, 1 Q. B. 536, Lord Esher.

³ The cheque had been left in blank entirely, save signature, by the drawer with his wife for her use in his absence, and the wife *employed* the clerk to fill in the sum required. He did so, skilfully leaving the blank before 'fifty,' written with a small 'f'; and then, being intrusted with the cheque to draw the money, he wrote in the words mentioned. That point is dwelt upon in *Holmes v. Trumper*, *supra*, as a 'very important circumstance.' The court there says: 'The cheque was filled up by the plaintiff's clerk, the alteration made, and the money drawn by him in person, and the plaintiff, by *employing him* [italics by the court] as he did, as his clerk, and (through his wife) as his agent to fill the cheque, and in person to draw the money from the bankers, might well be held to have placed a confidence in him for which he should be responsible, or at least to have authorized the bankers to place confidence in him.' And so the court itself in *Young v. Grote* distinguish *Hall v. Fuller*, 5 Barn. & C. 750, decided directly the other way. See also *Greenfield Bank v. Stowell*, *supra*.

where. There must be a blank at the beginning or at the end, unless, what not the most careful man ever does, a line is drawn before the first word and after the last, clean to the signature. Universal practice cannot be negligence.¹

Marginal terms, such as conditions, stipulations, and the like, not being mere memoranda of facts, such as the consideration, — in other words, marginal terms which are intended to be part of the written contract, — are treated by the better authorities as inseparable from the main writing to which the signature is given. And it makes no difference whether such marginalia are signed or not. Accordingly, to remove such terms, by cutting them off or in any other way, without consent, will be fatal. There is no distinction, by the better authorities, for there are decisions to the contrary, between cases of that sort and cases of the alteration of language in the body of the signed instrument. The instrument signed has equally been destroyed, and no action upon it can be maintained either in its present or in its original form.² And the same is plainly true of the cutting in two of instruments dexterously constructed, so that by cutting through them at a particular place one part will be left in form a perfect contract different in effect from the instrument uncut.³ In cases such as these there is ordinarily not even the semblance of negligence, and it is difficult to conceive how the defendant can be treated as having assented, or how he can be barred from showing that he never assented, to the supposed contract.

¹ See the language of the court in *Holmes v. Trumper*, supra, and the quotation from it in *Greenfield Bank v. Stowell*, supra. In regard to carelessly writing in pencil, which is erased and changed, see *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257.

² *Meade v. Sandidge*, 9 Texas Cir. Ap. 360; *Tuckerman v. Harwell*, 14 Am. Dec. 232, note; *Gerrish v. Glines*, 56 N. H. 9; *Johnson v. Heagan*, 23 Maine, 329; *Shaw v. First Methodist Soc.*, 8 Met. 223; *Fletcher v. Blodgett*, 16 Vt. 26; *Bay v. Shrader*, 50 Miss. 326; *Benedict v. Cowden*, 49 N. Y. 396; *Bank of America v. Woodworth*, 18 Johns. 315; s. c. 19 Johns. 391; *Brill v. Crick*, 1 Mees. & W. 232. See also *Franklin Sav. Inst. v. Reed*, 125 Mass. 365; *Benthall v. Hildreth*, 2 Gray, 288; *Heywood v. Perrin*, 10 Pick. 228. But see *Cornell v. Nebeker*, 58 Ind. 425; *Nebeker v. Cutsinger*, 48 Ind. 436; *Zimmerman v. Rote*, 75 Penn. St. 108; *Brown v. Reed*, 79 Penn. St. 370.

³ *Brown v. Reed*, supra.

§ 4. FORGED INDORSEMENT.

Still another case of want of contract arises where between the plaintiff and the defendant there is a forged indorsement.¹

Chain of title Each person who signs a negotiable contract of the
should be law merchant undertakes to pay to any one who
complete : acquires title according to the law merchant. That
meaning. law requires, not that every intervening holder of the paper
between the plaintiff and the defendant should have been owner
of the instrument or even the lawful holder of it, but that every
intervening indorsement of an owner should be genuine. The
holder may have a good claim against later indorsers ; back of
the forged indorsement he cannot go, for want of legal assent
on the part of the signers.² For example : The plaintiffs sue
the defendants to recover the amount paid by mistake by the
plaintiffs as acceptors to the defendants as holders of a bill of
exchange payable to A, whose indorsement had been forged.
The defendants were bona fide holders for value. The plaintiffs
are entitled to recover.³

There are one or two nominal exceptions to this rule. The
maker of a note, or the drawer of a bill or a cheque, can make it
payable to whomsoever he will ; and if he makes it
Exceptions to payable to a person having no interest in it, he
the rule. may indorse that person's name, and put the instrument into
circulation.⁴ So far as the question of his own liability upon
the instrument is concerned, it would make no difference
whether the maker or drawer had the authority of the payee to
indorse his name or not ; because having once used the payee's
name for the purpose of putting the paper into circulation, he
could not afterwards deny his right to do so. Indeed, it could

¹ Of course one whose signature is forged is not bound. N. I. L. § 30. But one may be estopped by conduct or words to set up the forgery. Id. ; infra, p. 226.

² *Canal Bank v. Bank of Albany*, 1 Hill, 287 ; *Hortsmann v. Henshaw*, 11 How. 177 ; *Cases*, 274 ; *Arnold v. Cheque Bank*, 1 C. P. D. 578.

³ *Canal Bank v. Bank of Albany*, supra.

⁴ As to paper payable to a fictitious person see ante, p. 26.

not affect the case that the payee was a party in interest, so far as the liability of the maker or drawer, on the instrument, is concerned. The act would be a forgery and of course not binding upon the party whose name was forged ; but the forger could not escape liability on the instrument—he could not allege that he had forged the payee's name.

More than that, the law merchant appears to hold the acceptor of a bill of exchange liable notwithstanding a forgery by the drawer of the payee's signature, if the forgery was committed before the acceptance.¹ For example: The plaintiff is suing to recover the amount of a bill of exchange paid by him as acceptor to the defendant, a bona fide holder for value, one of the drawers of the bill having, before the acceptance, forged the payee's name. The plaintiff did not know of the forgery when he paid. He is not entitled to recover.²

§ 5. FORGED SIGNATURE OF DRAWER, ETC.

Forgery of the signature of the drawer of a bill of exchange stands upon a footing of its own. Were it not for a special rule of law, founded upon the natural effect of acceptance, the case would be in no wise peculiar, and the courts would therefore hold that no action could be maintained against the acceptor by any person. But

Peculiarity of such case : estoppel to deny signature.

¹ Contra, it seems, if the drawer's forgery was committed *after* the acceptance. *Scholfield v. Londesborough*, 1896, A. C. 514, forgery by drawer in the *body* of the bill.

² *Coggill v. American Bank*, 1 Comst. 113. See *Hortsman v. Henshaw*, *supra*. The acceptance was of the drawer's order as the drawer chose to put it ; the drawer could request the drawee to pay to any one to whom he made the sum payable. But on the right to recover money back which has once been paid recent English authority is opposed to the current of American authority, not permitting recovery if any lapse of time has occurred during which the person receiving the money might have changed his position. *London Bank v. Bank of Liverpool*, 1896, 1 Q. B. 7. But see *Bank of Commerce v. Union Bank*, 3 Comst. 230 ; *Cases*, 249 ; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96 ; *Dana v. National Bank of Republic*, 132 Mass. 156 ; *Shepard Lumber Co. v. Eldridge*, 171 Mass. 516 ; *Winslow v. Everett Bank*, *id.* 534. In these American cases lapse of time is considered as no bar in the absence of negligence on the part of the person demanding return of the money.

the drawer and the drawee are, or they are generally assumed to be, correspondents; they are ordinarily in close business relations, the drawee usually holding funds of the drawer and often being his banker. The drawee is, therefore, presumably familiar with the hand of the drawer, and when he accepts a bill purporting to be the drawer's, he thereby asserts or admits that the signature is the genuine signature of the drawer.¹

That may well have misled a purchaser of the bill; and the law therefore holds the acceptor, by reason of his acceptance, estopped to deny his liability to a purchaser after acceptance who is a bona fide holder for value; the acceptance in such a case is binding, notwithstanding the fact that the drawer's signature is a forgery. For example: The plaintiff sues to recover the amount of a bill of exchange which as acceptor he has paid to the defendant, a bona fide holder for value who had discounted the bill after acceptance. The drawer's signature is forged, but the plaintiff did not know the fact when he accepted. The plaintiff is not entitled to recover; it was his duty to satisfy himself of the drawer's hand before acceptance, and his acceptance is a conclusive admission, in favor of the defendant, of the genuineness of the signature.²

The case from which the example is taken went still further. Another bill had been paid by the plaintiff, on presentment, without acceptance, the defendant having *already* taken it; but the same rule was applied, — the plaintiff was not allowed to show that the drawer's signature had been forged. The case, therefore, appears to go the length of holding the drawee bound by his act, whether of acceptance or payment, though that act could not have misled the holder into his purchase of the bill; enough that the acceptance or payment was in favor of a holder in due course.

That doctrine has since been denied, and the admission of genuineness of the signature put upon the ground that the drawee has, by his acceptance or by some other act in recognition of the bill, recommended the instrument. If the bill was taken

¹ N. I. L. § 69, 1.

² *Price v. Neal*, 3 Burr. 1354; Cases, 267. That is the leading case, and has had a long following. See Bigelow, Estoppel, 481 et seq., 5th ed.

before acceptance or other recognition, the drawee, according to this view, is not bound by his subsequent acceptance or payment, and accordingly may recover the money back again if he has paid it.¹ But the question appears to be settled, no doubt by custom, against this modification of the rule, and the rule established in general, that acceptance or payment by the drawee admits the drawer's signature in favor of a holder in due course.²

The rule however being founded on custom may indeed be changed by custom. Thus it is laid down that the acceptor may allege the want of genuineness of the drawer's signature, if he can show that by a settled course of business between the parties, or by a general custom of the place, the holder took upon himself the duty of exercising some particular precaution to prevent the loss, and failed of performing that duty.³ So also it has been held that if the holder himself indorsed the paper, as for collection, before it was presented to the drawee, the drawee will not be estopped from alleging that the drawer's signature was forged, because now the holder is thought to have asserted the genuineness of the bill, and to have misled the drawee.⁴ And again, if the owner of the bill, on presenting it to the drawee, withhold from him important information which the former has touching the question of genuineness, acceptance or payment will not be binding.⁵

It should be remembered that the estoppel goes no further than to cut off the acceptor's right to set up the want of genuineness of the drawer's signature, and that his acceptance does not preclude him from asserting that other signatures, with an exception above mentioned (where the drawer indorses the

¹ McKleroy v. Southern Bank, 14 La. An. 458; Cases, 270.

² N. I. L. § 69, 1, making no distinction; Lyndonville Bank v. Fletcher, 68 Vt. 81; National Bank of North America v. Bangs, 106 Mass. 441 (a *cheque*); First National Bank v. First National Bank, 58 Ohio St. 207 (a *cheque*); First National Bank v. Northwestern Bank, 152 Ill. 296; Marine Bank v. National City Bank, 59 N. Y. 67; National Park Bank v. Ninth National Bank, 46 N. Y. 77; Bills of Exchange Act, § 54 (2).

³ Ellis v. Ohio Ins. Co., 4 Ohio St. 628; First National Bank v. First National Bank, *supra*.

⁴ National Bank of North America v. Bangs, 106 Mass. 441.

⁵ First National Bank v. Ricker, 71 Ill. 439.

payee's name), are not genuine, or that the body of the bill has been altered.¹

There are other cases also in which the defendant has become barred of the right to allege want of contract between himself and the holder of the paper. Thus, to acknowledge a signature as one's own will preclude one from asserting, against a bona fide holder for value, who takes the paper thereupon, that the signature is not genuine.² So also if it appear that there has been a regular course of dealing, in which bills have been accepted by a clerk or agent whose signature has been acted upon by all parties concerned as the signature of the employer or principal, the fact will afford very strong evidence against the latter that he has authorized the acceptance in the present case.³ But a person is not bound as acceptor of a bill of exchange bearing a forged acceptance by the mere fact that he has previously paid one bill similarly forged, unless he has actually led the holder to believe in some other way that the present acceptance is genuine.⁴

§ 6. INCAPACITY.

Incapacity, natural or legal, to contract, by way of making, accepting, drawing, or indorsing, is a defence in all cases in favor of the incompetent party, and, it may be added, as in contracts of the common law, in favor of him only. It matters not what false representations touching capacity may have been made, as, for instance, by an infant that he is of age;⁵ it matters

¹ *First National Bank v. Northwestern Bank*, 152 Ill. 296; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Lyndonville Bank v. Fletcher*, 68 Vt. 91.

² N. I. L. § 30; *Buck v. Wood*, 85 Maine, 204; *Rosenplanter v. Toof*, 100 Tenn. 92; *Goodell v. Bates*, 14 R. I. 65; *Cohen v. Teller*, 93 Penn. St. 123; *Rudd v. Matthews*, 79 Ky. 479. See *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, which goes still further. But see *Koons v. Davis*, 84 Ind. 387, 389, which may be doubted.

³ *Morris v. Bethell*, L. R. 5 C. P. 47; *Crout v. DeWolf*, 1 R. I. 393.

⁴ *Morris v. Bethell*, *supra*; *Cohen v. Teller*, *supra*.

⁵ Compare *Baker v. Stone*, 136 Mass. 405; *Merriam v. Cunningham*, 11 Cush. 40; *Alvey v. Reed*, 114 Ind. 148; *Wieland v. Kobick*, 110 Ill. 16; *Burley v. Russell*, 10 N. H. 184; *Bartlett v. Wells*, 1 Best & S. 836. But see *Kilgore v. Jordan*, 17 Texas, 341.

not that, besides false representations of the kind, the paper has passed for value and without notice into the hands of an indorsee. In some States a contrary rule obtains with regard to unauthorized contracts made by a partner in trade in the name of his partnership.¹

It does not follow in law, however, from the fact that incapacity is a defence to an action upon the party's supposed contract, that he may not have capacity, when a holder, to transfer the paper to another. In regard to the power of transferring ownership of the instrument,

Capacity to transfer distinguished.

some authorities appear to distinguish between mental or natural incapacity, and incapacity created by or due to some regulation of law merely, that is, legal incapacity. According to such authorities, if the party's incapacity is due to mental defect, he cannot, of his own will and act, transfer the title to the paper which he owns.² Other authorities hold that transfer in such a case would be voidable only, not void, and hence would be good in favor of a holder for value without notice of the incapacity, at least until repudiated by the lawful guardian of the party.³ If the incapacity, aside from that of a married woman at common law, is merely legal, as in the case of an infant possessed of full mental capacity, or of a corporation, the title clearly may be passed by him in favor of any subsequent holder against other parties than the infant or corporation ; and that too whether the transfer is by indorsement or not.⁴

¹ See the cases cited in *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125, 135; *Smith v. Weston*, 159 N. Y. 194; *American Co. v. Bourn*, 29 S. E. 182; s. c. 69 Am. Dec. 678. But see *Worster v. Forbush*, 171 Mass. 423, not a trade partnership.

² *Rogers v. Blackwell*, 49 Mich. 192; *Hosler v. Beard*, 54 Ohio St. 398; s. c. 35 L. R. A. 161 and note; *Moore v. Hershey*, 90 Penn. St. 196; *Wirebach v. Bank*, 97 Penn. St. 543. It is admitted in *Hosler v. Beard* that the contrary would be true by the weight of authority if the instrument were given for necessities, or where it was obtained in ignorance of the party's incapacity (insanity) and for full consideration received by him. *Mathiessen v. McMahon*, 38 N. J. 536; *Young v. Stevens*, 48 N. H. 133.

³ *Hosler v. Beard*, supra; *Carrier v. Sears*, 4 Allen, 336, explaining *Peaslee v. Robbins*, 3 Met. 164, seemingly contra; *Burke v. Allen*, 29 N. H. 106; *Ashcroft v. De Armond*, 44 Iowa, 229; *Riggan v. Green*, 80 N. C. 236.

⁴ N. I. L. § 29; *Burke v. Allen*, 29 N. H. 106. But see *Hosler v. Beard*,

A few words further should be said concerning corporations in this connection. A corporation created by statute has, by reason of its creation by statute, such powers only as the statute directly or by plain inference confers upon it, in other words, only the powers conferred and their incidents. A corporation, as such, has no inherent power to bind itself generally by making, accepting, drawing, or indorsing paper of the law merchant even in favor of a bona fide holder for value; power so to bind itself must be given to it by the legislature, either directly or by plain inference.¹ But in so far as the corporation has power to make a particular contract, it has power incidentally, that is, by plain inference, to make, accept, draw, or indorse in respect of such contract.² For example: A company is incorporated to construct a railway. The directors are empowered to do whatever they may consider incidental or conducive to the object. In furtherance of that object they accept a bill drawn upon them. The acceptance is binding.³ Again: The same corporation accepts a bill drawn upon it in favor of the objects of *another* railway-construction company. The acceptance is not binding.⁴

A corporation then may have power to make one kind of contract, and not have power to make a contract of another kind; and the result is, that accepting, making, or indorsing paper of the law merchant in the latter sort of case is not binding even in favor of a holder in due course. Nor, by the better view, will the case be affected by the circumstance that the corporation may have made false representations of its powers.⁵ But

supra. That assumes of course that the party owns the paper (or has authority of the owner to transfer). At common law a married woman could not transfer paper made or indorsed to her when single; but the reason was, not because she was incompetent to contract, which is another thing, but because the paper, after her marriage, was no longer hers.

¹ *Mott v. Hicks*, 1 Cowen, 513; *In re Peruvian Ry. Co.*, L. R. 2 Ch. 617.

² *In re Peruvian Ry. Co.*, *supra*; *Came v. Brigham*, 39 Maine, 35; *Curtis v. Leavitt*, 15 N. Y. 9.

³ *In re Peruvian Ry. Co.*, L. R. 2 Ch. 617.

⁴ *Smead v. Indianapolis R. Co.*, 11 Ind. 104. Qu. whether overruled by *Madison R. Co. v. Norwich Society*, 24 Ind. 457, 461.

⁵ *Northern Bank v. Porter*, 110 U. S. 608.

if, instead of being wholly without power to make the contract, it had power to make it, though not in the way or by the means employed, or if it had power to make contracts which ordinarily would include the one in question,¹ the corporation will be liable to holders in due course.² It should further be observed, as was said above of other cases, that the incapacity of a corporation to contract in the particular case does not imply incapacity to transfer title.³

§ 7. ILLEGALITY: INSTRUMENTS VOID BY STATUTE.

Illegality is not necessarily an absolute defence; in most cases it is only an equity. And that may be true though the courts go so far as to say in a particular case that the contract is absolutely void for illegality, unless the statement is made upon authority of statute. Statute and common law invalidity distinguished.

If statute in terms declare a contract void without qualification, it cannot be enforceable even under the law merchant; whereas if a contract is declared void by the common law, or by construction of some statute which does not plainly declare it void, it will not necessarily be void in the law merchant. In other words, a contract which, by loose construction of statutes or under the operation of the common law, or between immediate parties under the operation of the law merchant, may be called void or even 'absolutely void,' — a term sometimes used, but with doubtful fitness, — is not necessarily void when it takes the form of negotiable paper, and is found in the hands of a bona fide holder for value.

The difference between what we have called loose construction, and plain language of statute, may be shown by comparing the case of a promissory note made on Sunday, with that of a promissory note made under a statute like an old one in Massachusetts which declared that notes under \$5.00 should be entirely in writing; otherwise they were to be 'utterly void;' or

¹ *American Bank v. Gluck*, 68 Minn. 129.

² N. I. L. § 29. See upon this whole subject, *Bigelow, Estoppel*, 464-469, 5th ed.

³ *Brown v. Donnell*, 49 Maine, 427.

under the old usury statutes. The statutes in regard to Sunday observance do not declare that contracts made on Sunday shall be void, nor do they use language which necessarily or naturally bears such a meaning; it is only by loose language that Sunday contracts have been declared to be 'void' or 'absolutely void.'¹

Now, no action could be maintained under the old statute in regard to notes under \$5.00, or under any other statute using the like plain language, — not even a bona fide holder for value could maintain an action; whereas the contrary would be true of such a holder of a note made on Sunday. The statute in the one case creates a legal defence, in the other an equity. For example: The plaintiff is bona fide holder for value, and the defendant maker, of a large number of promissory notes sued upon, each under \$5.00, and each bearing the impression of printing, and issued after April 1, 1805, though bearing an earlier date. They are antedated with a view to avoid a statute which declares notes of the kind, made or issued after said date, to be 'utterly void.' The plaintiff cannot recover.² Again: The plaintiff is holder for value bona fide, and the defendant is maker of a promissory note sued upon, made and payable in the State of New York upon a usurious consideration; the statutes of that State declaring contracts made upon usurious consideration to be void, without qualification. The plaintiff cannot recover.³ Again (under Sunday laws): The plaintiff is a bona fide holder for value, and the defendant is maker of a promissory note sued upon, which note was made, dated, and delivered Sept. 4, 1892, which day was Sunday, and payable four months after date. The plaintiff discounted the note in the month of December following. He is entitled to recover.⁴

Sometimes statutes which declare that contracts made in violation of them shall be void, make an exception in favor of bona

¹ Between the parties the contract may properly be said to be absolutely void where it is incapable of being ratified or otherwise made good.

² *Bayley v. Taber*, 5 Mass. 286; *Cases*, 286.

³ See *Holmes v. Williams*, 10 Paige, 326; *Mordecai v. Dawkins*, 9 Rich. 262; *Towne v. Rice*, 122 Mass. 67, 71.

⁴ See *State Bank v. Thompson*, 42 N. H. 369. And compare *Horton v. Buffinton*, 105 Mass. 399.

fide holders for value of negotiable instruments so made, as in the case of a prohibitory liquor law which declares paper made in violation of its provisions 'utterly null and void against all persons, and in all cases, excepting only as against the holders . . . who may have paid therefor a fair price . . . without notice or knowledge of such illegal consideration.' In such a case, again, the illegality becomes an equity, and by force of the statute itself the bona fide holder for value is entitled to recover payment of the paper.¹

§ 8. STATUTES OF LIMITATION.

These statutes make an absolute defence. Holders do not necessarily have notice whether the period of limitation has run out or not. The instrument may not be dated, or, ^{Not a mere} what is usual, an indorsement may not be dated; ^{equity.} but the real date of the act, or rather of the delivery following it, may be shown, where there is nothing, such as subsequent payments of interest,² or instalments, to prevent the running of the statute from that time.³

¹ Paton v. Coit, 5 Mich. 505.

² Topeka Company v. Merriam, 60 Kans. 397.

³ Payment by the maker of an indorsed note will not stop the running of the statute in favor of the indorser. Maddox v. Duncan, 143 Mo. 613.

CHAPTER XVII.

EQUITIES.

§ 1. BONA FIDE HOLDER FOR VALUE, OR HOLDER IN DUE COURSE.

EQUITIES, as we have seen, imply the existence of a contract, the contract, because of such defences, being defeasible between the parties to the equities and all others standing **What equities** imply. 'in their shoes,' but binding in favor of bona fide holders for value or holders in due course.¹ This is, indeed, the great field of bona fide holders for value, the field in which the rights of such holders stand out conspicuously as the most favored in the law. It is here that the law merchant appears in its strongest colors and in its most striking contrast to the common law.

Purchase for value and without notice cuts off equities is the cardinal rule. A holder in due course, the Statute declares, holds the instrument free from any defect of title of prior parties, and free from defences available by such parties among themselves, and may enforce payment of the instrument for the full amount against all parties liable thereon.²

¹ Holder 'in due course' is the well-chosen term of the American, following the English, Statute, shortly expressing the idea stated more fully and also more concretely in the words 'bona fide holder for value.' The Statute defines the holder in due course as one who has taken the instrument (1) as complete and regular on its face, (2) before it became overdue and without notice of any dishonor of it, (3) in good faith and for value, (4) and without notice of any infirmity in it or defect of title in the hands of the person negotiating it. N. I. L. § 91. See Bills of Exchange Act, § 29. That then is what is meant also by the expression 'bona fide holder for value.'

² N. I. L. § 64; *Memphis Bethel v. Bank*, 101 Tenn. 130 (purchase for value from trustee without notice of breach of trust by him). But it seems that a holder subject to equities may be liable to prior parties in damages if he transfers the instrument to a holder in due course and a prior party is compelled to pay. *Nashville Lumber Co. v. Fourth National Bank*, 94 Tenn. 374; s. c. 27 L. R. A. 519, and note.

The first thing then to be grasped is the meaning of the term 'bona fide holder for value.' The term is one of deliberately chosen use, each part of it having a characteristic meaning, and each part being necessary to give the party the paramount rights above mentioned; though where it is not important to make any distinction, either part of the expression is often used for the whole. But to enable the holder to occupy the most favored position, he or some one before him must have been both a bona fide holder and a holder for value. What, then, constitutes one a bona fide holder, and what a holder for value?

A preliminary general remark should be made. Ordinarily there intervenes between the bona fide holder for value, with the *special* rights of such party, and the defendant at least one person. But that is not necessary; the payee of a bill of exchange, or of a cheque, or even of a promissory note,¹ or the drawer of a bill or cheque,² may be such a holder, as for instance where the instrument has been offered to the payee for discount and so purchased.

§ 2. BONA FIDE HOLDER: NOTICE: NEGLIGENCE.

The term 'bona fide holder,' properly speaking, means a holder according to the law merchant, without knowledge or notice of equities of any sort (defences not absolute) which could be set up against a prior holder of the instrument. Absence of knowledge or notice of the defence, when the instrument was taken, is the essential thing in the matter of bona fides. Notice calls for very special explanation.

In other departments of law notice may be either absolute or constructive. The contrast to constructive notice is usually put as actual notice; but that is an objectionable designation; it naturally suggests, and indeed is commonly used and understood to mean, knowledge.³

¹ Lookout v. Aull, 93 Tenn. 645; Passumpsic Bank v. Goss, 31 Vt. 315; Willet v. Parker, 2 Met. 608; Deardorff v. Forseman, 24 Ind. 481.

² Merritt v. Duncan, 7 Heisk. 156.

³ As a matter of fact, 'actual notice' in the law of bills and notes means knowledge; but it would be better to say that the plaintiff had knowledge, than that he had actual notice.

Meaning of term.

Absolute and constructive notice.

But that leaves too much for constructive notice ; it leaves much to that kind of notice which is not 'constructive' at all, as, for example, notice by the public registry. And if notice by the registry be called actual notice, then actual notice is used in inconsistent senses ; in one sense it means knowledge ; in another, something short of knowledge.

The term 'absolute notice' creates no such confusion ; it does not suggest or mean knowledge at all. It means the kind of notice which in and of itself is notice ; the registry, for example, is notice in and of itself, — the Statute makes it so, and it is, therefore, absolute notice ; taking a negotiable bill or note after maturity is in and of itself notice (of equities, if any exist), — the law merchant makes it so, and hence it is absolute notice. Whether there is knowledge or not in these cases is immaterial.

'Constructive notice' is a very different thing both in manifestation and in effect. It arises from facts putting one upon inquiry ; a person has been put upon a trail. The Constructive notice: negligence. trail must be followed, but if followed with proper diligence, there is an end of the notice altogether, whatever the result. The notice attaches, in other words, only when the trail is not taken up and diligently followed, that is, when there is negligence.

In still other words, and dropping the figure, constructive notice imports knowledge of a preliminary fact or set of facts which would suggest to the average man the existence of some ulterior fact of importance ; the preliminary fact puts him upon inquiry concerning the probable, ulterior fact. If he does not pursue the inquiry suggested, or if he pursues it faithlessly rather than faithfully, he is fixed with notice of it ; he stands as if he knew it. Thus, a man about to buy a horse hears of a fact which would suggest to a man of average intelligence that perhaps another may have an unrecorded lien upon the animal. Now if that man buys the horse without making any inquiry in regard to the possible lien, he will buy it with notice if any lien in fact exists ; on the other hand, if he makes diligent inquiry, and his suspicion is entirely removed, he takes title free from the defect though in point of fact there was a lien.

Absolute notice, as we have seen, is part of the law of bills, notes, and cheques; and it was at one time supposed that constructive notice — by putting upon inquiry and negligence — was also, in the full sense of the term, part of the same law, and in some States it is to this day. For example: The plaintiff, a banker, is indorsee of a bill of exchange, accepted by the defendant, and now sued upon. The bill, indorsed in blank, was offered to the plaintiff for discount by an entire stranger to him. The plaintiff makes no inquiry of the stranger concerning his title or right to the bill, and discounts it. The stranger had found the bill, and had no right to it except as finder. The plaintiff (by some authorities on the unwritten law) cannot recover, having constructive notice that the stranger had no right to the bill; it was the plaintiff's duty, the bill being offered by a stranger, to make inquiry, and he was guilty of negligence in failing to make it.¹

This rule of constructive notice was laid down in England in the year 1824, and was maintained there until the year 1836, when it was overturned. The rule of 1824 was never quite satisfactory, and it was finally declared, in 1836, in effect, that this doctrine of constructive notice, by way of negligence, being a bar to the demand of a holder who had paid value and was not otherwise affected with notice, was unsuited to the law merchant as applied to bills and notes, that is, it was inconsistent with custom; and the contrary was now firmly and finally laid down.

Negligence only, even though gross, accordingly was and still is in England held insufficient to defeat the claim of one whose right to recover is otherwise perfect; nothing short of bad faith will suffice to subject him to the equities which the defendant seeks to set up.² And that has long been the prevailing rule in this country, the most of our courts which had at first accepted the earlier doctrine having, since 1836, abandoned

¹ *Gill v. Cubitt*, 3 Barn. & C. 466; *Sturgis v. Metropolitan Bank*, 49 Ill. 220, 227; *Merritt v. Duncan*, 7 Heisk. 156; *Limerick Bank v. Adams*, 70 Vt. 132.

² *Goodman v. Harvey*, 4 Ad. & E. 870.

that doctrine for the one just stated. For example: The plaintiff is an indorsee for value of a bill of exchange now sued upon, which was purchased by him in good faith, in point of fact, and the defendant is acceptor thereof. At the trial the following instruction was given to the jury: 'If such facts and circumstances were known to the plaintiff as caused him to suspect, or would have caused one of ordinary prudence to suspect, that the drawer had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts,' the plaintiff cannot recover. The instruction was erroneous; nothing short of bad faith would overcome the plaintiff's demand, and the plaintiff need not show the absence of bad faith.¹

Proof of bad faith will subject the plaintiff to equities, if such exist; and bad faith may be shown, for instance, by evidence that he himself actually had reasonable suspicion, from facts within his knowledge, that the prior holder's title was somehow tainted or defective, and still went forward and purchased the instrument, closing his eyes to the facts and not making inquiry.² To that extent the doctrine of constructive notice, a term which may cover cases of bad faith as well as of negligence, obtains in the law of bills, notes, and cheques, and to that extent only, except in the few States in which the courts still adhere to the English doctrine of 1824.

There is then a limited sense in which it is still true that putting one upon inquiry is (constructive) notice, if the inquiry be not pursued; but it is not the sense in which putting upon inquiry amounts to notice by the common law or in equity, which proceeds upon the footing that it is enough that it

¹ *Goodman v. Simonds*, 20 How. 343. See also *Lancaster Bank v. Garber*, 178 Penn. St. 91; *Second National Bank v. Morgan*, 165 Penn. St. 199; *Cheever v. Pittsburgh R. Co.*, 150 N. Y. 59; N. I. L. § 63: 'To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.'

² *Jones v. Gordon*, 2 App. Cas. 216, 228.

would be negligence not to inquire. When by the general law merchant putting upon inquiry amounts to constructive notice, the facts suggesting inquiry are strong and decisive, so that to turn away from them amounts not merely to negligence, or even gross negligence, but, as the Statute well puts it, to bad faith.

That must be the sense, where the later English rule has been adopted, when it is said that a purchaser of a negotiable instrument takes it with notice if he had knowledge of circumstances sufficient to put him upon inquiry.¹ Thus it might be said that an officer of a corporation making paper of the corporation payable to himself, and then attempting to deal with it for his own benefit, to the knowledge of the purchaser, puts the purchaser upon inquiry, because he could not turn away from such facts without the imputation of bad faith.² But the expression is misleading and highly objectionable except when applied to constructive notice in the broad common law sense. The two senses in which the term 'constructive notice,' or the putting one upon inquiry, is used should then be clearly observed.

Suppose that on the face of the instrument it appears that the holder from whom it has been purchased is a trustee. Is this a fact from which one may turn without inquiry? In Purchase from trustee. those States in which the English rule of 1824 prevails, to wit, the common law rule in regard to constructive notice, inquiry must be made; the fact is constructive notice, if inquiry is not made or not faithfully made, of whatever might well have been ascertained concerning the power of the trustee to sell the instrument and use the proceeds.³ It is clear that

¹ See the language of O'Brien, J., in *Cheever v. Pittsburgh R. Co.*, 150 N. Y. 59, 65. This is shown by language just before used by the same judge. 'The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the speculative issue as to his diligence or negligence.' *Id.* at p. 65.

² *Cheever v. Pittsburgh R. Co.*, *supra*. To such a case was the language of O'Brien, J., to be applied. See also *Stough v. Ponca Mill Co.*, 54 Neb. 500; *Third National Bank v. Marine Lumber Co.*, 44 Minn. 65.

³ 'He who takes a security from a trustee, with his fiduciary character displayed upon its face, is to inquire as to his right to dispose of it; but if on

this would not be true in those States in which only the limited rule of constructive notice prevails. The presence of the word 'trustee' would not create suspicion so as to demand inquiry ; the custom (forced where the broad rule of constructive notice prevails) is clear upon the point.

Suppose that on the face of the instrument there is a statement of the consideration for which the instrument was given, something more, that is to say, than the usual 'For consideration. value received.' It is clear that under either doctrine of constructive notice a statement of consideration of itself is not enough to put the purchaser upon inquiry to see whether it is true or what the truth may be.¹ There must be more than the recital ; what the recital declares, indicates, or suggests will be the question. Thus even under the broad rule, a recital upon a negotiable promissory note that it is given in payment for rent to become due is no notice that the title to the land may pass to another.²

Suppose again that an indorsement in the name of a partnership is for the accommodation of another, and is known to be so by the transferee. This would be notice, under *Misuse of partnership name.* either doctrine, of want of authority in the partner who made the indorsement ; for presumptively it is beyond the objects of a partnership to become a surety,³ though of course a partnership might be formed for such a purpose.

inquiry it is found that there is no restriction upon the trustee's power of disposition, or (it may be added) there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of the purchaser in question, for value and before maturity, will be protected.' *Bank v. Looney*, 99 Tenn. 278.

Such cases are to be distinguished from cases in which there is a contest between the purchaser and the cestui que trust ; there the rule is or may be still stronger in favor of the cestui que trust. *Id.* See e. g. *Freeman v. Bailey*, 50 S. C. 241. The text refers to actions upon the negotiable instrument. See also *Fox v. Citizens' Bank*, 35 L. R. A. 678, note.

¹ *Ferris v. Tavel*, 87 Tenn. 390 ; *Bank v. Michael*, 96 N. C. 53 ; *Buchanan v. Wren*, 10 Texas Civ. Ap. 560 ; *Fant v. Wickes*, *id.* 394 ; *Beatty v. Western College*, 177 Ill. 280 ('for erection of boarding hall').

² *Buchanan v. Wren*, *supra*.

³ *Smith v. Weston*, 159 N. Y. 194 ; *Stall v. Catskill Bank*, 18 Wend. 466.

Plainly it would not be enough under either doctrine of constructive notice that the facts of which the holder is aware involve only a possible or potential equity. For ^{Potential} example: The plaintiffs are indorsees, and the de- ^{equity.} fendants acceptors, of a bill of exchange now sued upon. When the plaintiffs took the bill they were informed that it was accepted in part payment of the price of a brig, which by the bargain was to be put in repair and made seaworthy. This agreement had been broken, but of that fact the plaintiffs had no information or knowledge. The plaintiffs are entitled to recover; they were not bound to inquire whether the agreement for repairs had been performed.¹ Again: The plaintiff is indorsee, and the defendant acceptor, of a bill of exchange sued upon. The acceptance was in consideration of a promise by the drawer, made known to the plaintiff, to send to the acceptor six hundred bushels of wheat at the opening of navigation thereafter; which promise, performable before the bill became due, was not kept. The plaintiff was not bound to inquire whether the promise had been kept, and not knowing of the default, is entitled to recover.²

Such cases are free from serious question. But it will be difficult sometimes to determine whether the facts constitute constructive notice or not, under either doctrine. Suppose for instance that a purchaser of a negotiable promissory note before maturity has knowledge that instalments of interest are overdue; is this constructive notice of the existence of equities, assuming that equities exist? The authorities even under the narrow doctrine of constructive notice are not agreed.³ But the better rule appears to be that it is not notice.

¹ *Davis v. McCready*, 17 N. Y. 230.

² *Cameron v. Chappell*, 24 Wend. 94. It is conceived that these cases would be accepted where the broad rule of constructive notice obtains. *Bank v. Penland*, 101 Tenn. 445. See also *Blue Springs Mining Co. v. McIlvian*, 97 Tenn. 225; *Bank v. Stockell*, 92 Tenn. 252. Nor would inadequacy if not gross be notice of equities under either doctrine. *Oppenheimer v. Bank*, 97 Tenn. 19. So 'as advised.' *American Bank v. Gluck*, 68 Minn. 129.

³ That it is notice, *First National Bank v. Forsyth*, 67 Minn. 267 (on mere authority, it seems); *Newell v. Gregg*, 51 Barb. 263; *Chouteau v. Allen*,

Between knowledge and absolute notice of *equities*¹ there appears to be no difference in legal effect ; either of itself will prevent one from being, on one's own title, a bona fide holder. So far as it may be helpful to distinguish between the two, one may be said to have knowledge of what one may testify to in court directly as a fact, including what one cannot testify to only because of some reason of a personal or peculiar nature (e. g. what has passed between husband and wife or between persons in any other confidential relation creating privilege); while absolute notice may be said to consist (1) in specific information of an equity itself as distinguished from knowledge of facts leading to an equity; (2) in some statutory declaration; or (3) in some positive doctrine of the law merchant.

By 'information' in the first mode is meant what is heard or read, or learned from another, as distinguished from knowledge; 'Information' of which the common poster 'Notice' or 'Take of equity. Notice' is a good example. And this information must purport to be of the actual existence of an equity ; otherwise it would at most be only a putting upon inquiry, already disposed of. Thus an indorsement bears the words 'For collection' or 'For account of.' This is 'information' that the indorsee is a special agent of the indorser ; that is, that the latter has not parted with his title.²

Of 'statutory declaration,' all that need be said is that the legislature may make the performance of any act to be done in a public way, such as the registration of an instrument, absolute notice of its existence and contents.

70 Mo. 290, 339. Contra, *National Bank v. Kirby*, 108 Mass. 497 ; *Cromwell v. Sac County*, 96 U. S. 51 ; *Kelley v. Whitney*, 45 Wis. 110 ; *State v. Cobb*, 64 Ala. 127 ; *Brooks v. Mitchell*, 9 M. & W. 15.

¹ Notice of *dishonor* is a different thing from knowledge of it. See ante, pp. 133, 134, 142 et seq.

² *United States Bank v. Geer*, 55 Neb. 462 (overruling 53 Neb. 67, that such indorsement is ambiguous and hence controllable by evidence) ; *Bayer v. Richardson*, 53 Neb. 156 ; *Freeman's Bank v. National Tube Works*, 151 Mass. 413 ; *Leary v. Blanchard*, 48 Maine, 269 ; *Blaine v. Bourne*, 11 R. I. 119 ; *Armour Banking Co. v. Riley Bank*, 30 Kans. 163.

The third mode, 'positive doctrine of the law merchant,' refers to cases in which there has been, or may have been, no information of the existence of any particular equity ^{Taking after maturity.} or of any equity at all. The one typical case, if not the only case, of the kind is the taking of a negotiable instrument after maturity; that is positive notice of any equity whatever which may then exist against the holder. The only question, then, is whether the instrument was taken *after* its maturity. One or two points may be noticed. To take an instrument entitled to grace on the last day of grace is not to take it after maturity; at least, if it was taken within business hours of that day, being paper payable at a place having established hours of business.¹ Maturity lasts until the latest moment for making payment according to the terms of the contract. On the other hand, to take a cheque long after its date has well been held as taking it with *prima facie* indication that it has been dishonored; that is, that it is overdue.² The date of an instrument, however, is only presumptive evidence of the time when it was issued; it may have been delivered long afterwards (or before), and it becomes a valid undertaking only from its delivery.³

§ 3. HOLDER FOR VALUE.

The term 'holder for value,' the complement of 'bona fide holder,' means, properly speaking, a holder who has taken the paper upon a valuable consideration, and has thereby acquired the title to it⁴ according to the ^{Meaning of 'value' as at common law.} law merchant.

The term 'valuable consideration' is, of course, borrowed by the law merchant from the common law, or rather has been im-

¹ Farrell v. Lovett, 68 Maine, 326 ; Crosby v. Grant, 36 N. H. 273.

² Cowing v. Altman, 71 N. Y. 435.

³ Id. ; N. I. L. § 23. An undated instrument is treated as dated of the time when it was issued. N. I. L. § 24, 3. In such a case, if the instrument is payable at a fixed time after date, or after sight in the case of a bill, any holder may insert the true date, and the instrument will be payable accordingly. Id. § 20. If the instrument be postdated and payable at a future time, the time will be reckoned accordingly, regardless of the day of delivery.

⁴ N. I. L. § 2, word 'value.'

posed upon the law merchant,¹ and has the same meaning which it bears in the law of contract generally;² though its meaning has perhaps been pushed further, by the needs of business, in the law merchant than elsewhere. The consideration must be valuable; it is not enough that it is merely 'valid,' 'good,' or 'meritorious,' so as to convey the title, as in the case of gift.³ All the authorities agree in that proposition. It may be, indeed, that one to whom a negotiable instrument has been given can recover upon it; but that will be because the giver, or some prior holder, had a right of action upon it, and not because the present owner is himself a holder for value.

Valuable consideration consists in some legal right, by way of interest, profit, or *benefit*, accruing to the one party, or some loss of legal right, by way of forbearance, damage, or *detriment* suffered by the other.⁴ It is not necessary that there should be 'quid pro quo,' or benefit of any kind, to make one a holder for value; detriment (in respect of legal right) is enough.⁵ That may be shown by the case of accommodation paper, already considered; the accommodation party has no benefit, or may have none, from the transaction, but he is bound towards one who takes the paper for value; that is, who parts with something of value, and so suffers detriment for the time. That that is a doctrine of contract in general may be shown by the following illustration: If A mortgage his land

¹ See ante, pp. 3, 8.

² Id. § 32: 'Value is any consideration sufficient to support a simple contract.'

³ Thus love and affection are not a valuable consideration in the law merchant any more than by the common law. *Kern's Estate*, 171 Penn. St. 55. Delivery of a promissory note as a gift is not an executed gift of the money, but revocable and revoked by the death of the maker before payment. Id.; *School District v. Sheidley*, 138 Mo. 672. What amounts to a delivery of the note so as merely to vest title in the donee see *Jennings v. Neville*, 180 Ill. 270; *Taylor v. Harmison*, 179 Ill. 137. These are cases of 'good' consideration as distinguished from 'valuable.'

⁴ *Currie v. Nind*, L. R. 10 Ex. 162. Note that it is *legal right*, whether benefit or detriment.

⁵ *Alabama Bank v. Rivers*, 116 Ala. 1.

to B, to secure B in lending money to C, B is a purchaser for valuable consideration, though A may have no benefit at all.¹

While, however, the authorities agree upon the definition, those relating to the unwritten law merchant do not agree in its application. The courts of this country are divided on the unwritten law upon the question of the effect of transfers of paper for security; and that makes about the only question touching valuable consideration which calls for special remark in a work like this; most other questions of consideration can be answered, in view of what has already been said, by the law of contracts in general. The particular point of difficulty is whether the mere taking of a negotiable instrument by a creditor from his debtor, as security for or in conditional payment of a pre-existing debt, but with full title, constitutes the taker a holder for value.

Such a case seems at first, looking at it from the common law point of view, one merely of so-called 'valid' consideration, operative indeed between the debtor and his creditor, so as to enable the creditor to hold the instrument against his debtor, but wanting in value, and hence failing to make the creditor a holder for value. And so not a few courts in the United States, following the lead of the courts of New York, hold. For example: The plaintiff, suing in equity, being owner of a vessel, employs the defendants, A and B, to sell her on credit, taking good notes in payment to be transmitted to him. A and B sell the vessel and take notes of the purchasers, payable to certain persons, and duly indorsed. Instead of delivering the paper to the seller of the ship, A and B now deliver the said notes to C and D, co-defendants in the case, who are under heavy responsibility for A and B as accommodation indorsers for them of paper not yet due, which paper C and D are at a later time obliged to pay. C and D know nothing of the circumstances under which A and B became possessed of the notes, and believe them to be the rightful property of A and B; and they receive the notes as security for the responsibility which they had incurred, and

¹ Ex parte Hearne, 1 Buck, 165; *Marden v. Babcock*, 2 Met. 99; *Bigelow, Fraud*, ii. 444.

three days afterwards dispose of some of them for cash, before becoming aware of the plaintiffs' rights. The plaintiffs are deemed entitled to the notes or their proceeds, the defendants not having taken them for valuable consideration.¹ Again: The plaintiff, suing in trover, alleges that the defendant has converted to his own use two promissory notes. The defendant came thus by the notes: A and B, being in debt to the defendant on a certain note which they could not pay, prevail upon the defendant to withdraw it from the hands of a collecting bank by delivering to him the two notes in question as security, in fraud of the rights of the plaintiff, the owner, the defendant promising to pay the overdue note in a short time. There has been no agreement, however, to forbear suit thereon. A and B stop payment and fail, without paying their debt to the defendant; and the defendant receives payment of the two notes. The plaintiff is deemed entitled to recover, the defendant not having taken the notes for value, the debt to secure which they were taken being wholly a pre-existing debt.²

Between the cases which make these two examples, a question similar in effect, at least as treated by the court, went to the Supreme Court of the United States, and that court took the contrary view; and the decision has had a large following, larger probably than that of the courts of New York.

According to the Federal Court and its following, the creditor, taking full title though only as security or conditional payment, takes for value, notwithstanding the fact that the debt for which the paper was taken was a pre-existing debt in no respect then

¹ *Bay v. Coddington*, 5 Johns. Ch. 54; affirmed, 20 Johns. 637. This is the leading case on that side of the question.

² *Stalker v. McDonald*, 6 Hill, 93, affirming *Bay v. Coddington*, on review of the intervening authorities including *Swift v. Tyson*, 16 Peters, 1, to the contrary. See also to the same effect of paper taken as security or in conditional payment for prior debt, *Martin v. Bank*, 94 Tenn. 176; *Loewen v. Forsee*, 137 Mo. 29; *Keokuk Bank v. Hall*, 106 Iowa, 540; *Comstock v. Hier*, 78 N. Y. 269; *Royer v. Keystone Bank*, 83 Penn. St. 248; *Cummings v. Boyd*, id. 372; *Bardsley v. Delp*, 88 Penn. St. 420; *Fenouille v. Hamilton*, 35 Ala. 322; *Lee v. Smead*, 1 Met. (Ky.) 628; *May v. Quimby*, 3 Bush, 96; *King v. Doolittle*, 1 Head, 77; *Bertrand v. Barkman*, 13 Ark. 150; *Roxborough v. Messick*, 6 Ohio St. 448; *Nutter v. Stover*, 48 Maine, 163.

created.¹ For example: The plaintiff is indorsee, and the defendant acceptor, of a bill of exchange sued upon. The plaintiff took the bill before it became due, in good faith, in payment of a promissory note due to him by A and B, drawers of the bill, the plaintiff fully believing the bill to be justly due. The bill had been accepted in part payment of lands sold by A and B under false and fraudulent representations by them. The plaintiff is a holder for value, though the debt was pre-existing entirely, and being also a bona fide holder he is entitled to recover; the case being treated by the court as if the plaintiff had taken the bill to *secure* payment of the pre-existing debt.² Again: The plaintiffs are indorsees, and the defendant is maker, of a promissory note now sued upon. The defendant made the note, without consideration, for the accommodation of the payee. The payee delivers the note indorsed by himself to A, without consideration, for the purpose of having it discounted for the payee's benefit. Instead of procuring the note to be discounted, A pledges it to the plaintiffs as collateral security for a (smaller) pre-existing debt due by A to them. The plaintiffs take the note without knowledge of the facts here stated. They are holders for value, and are entitled to recover to the extent of the debt due to them by A.³

¹ Brooklyn R. Co. v. National Bank, 102 U. S. 14; People's Bank v. Clayton, 66 Vt. 541; Merchants' Ins. Co. v. Abbott, 131 Mass. 397, 400; Stevens v. Blanchard, 3 Cush. 162, 169; Le Breton v. Pierce, 2 Allen, 8, 14; Bank of Republic v. Carrington, 5 R. I. 515; First National Bank v. McAllister, 46 Mich. 397; Dyer v. Rosenthal, 45 Mich. 588; Beuerman v. Van Buren, 44 Mich. 496; Reddick v. Jones, 6 Ired. 107; Gibson v. Connor, 3 Kelly, 47; Valette v. Mason, 1 Smith (Ind.), 89; Turner v. Killian, 12 Neb. 580; Currie v. Misa, L. R. 10 Ex. 153; Percival v. Frampton, 2 Crompt. M. & R. 180; Peacock v. Purcell, 14 C. B. N. s. 728; Taylor v. Blakelock, 32 Ch. Div. 560. Some of these are the still stronger cases of property transferred to the creditor. See Bigelow, Fraud, ii. 459 et seq.

² Swift v. Tyson, 6 Peters, 1; Cases, 300. The report of the case states that the bill was taken in 'payment,' but the majority (there was a dissenting opinion) put the case on the footing of paper taken in security of a prior debt, and treat the taking in either way as a taking for value. Of course that was not necessary to the decision of the case, but the opinion was deliberately expressed, and it has been accordingly taken as authority for the doctrine expressed.

³ Fisher v. Fisher, 98 Mass. 303.

The doctrine thus laid down is the doctrine of the courts of England and of many of the courts of this country, and it appears to be sound. Even on strict common law view. The better view. doctrine, it does not follow from the fact that the debt to secure which the paper was taken was wholly pre-existing, and that there was no agreement for forbearance, or other factor in the case besides the transfer of title by the debtor to the creditor, that the creditor has not taken the paper for valuable consideration. Detriment to the creditor creates a valuable consideration; and detriment arises wherever the party assumes by the transaction burdens or duties not resting upon him before, the failing to bear or perform which will result in loss or in diminution of his debt. And such is the situation in question. The creditor takes from his debtor a negotiable security; perhaps there are parties to it liable conditionally only, on the taking of certain steps. The holder takes the security upon the implied condition or undertaking to perform the duties involved, on pain, in case of failure, of losing the debt secured or having it cut down to the extent of the loss caused to his debtor by his own failure of duty.¹ But it does not matter whether there are parties conditionally liable or not; in any event the holder takes the security upon the implied condition or undertaking that he will exercise diligence in collecting the money out of it and applying it upon the debt, on pain, in case of failure so to act, of discharging the debt to the extent of the loss sustained. All that involves, when the collateral is taken,—and that is the moment to be considered,—indefinite detriment to legal right, the possibility of having to sue with the trouble and expense incident, among other things. That clearly makes him a holder for value. The Statute, beginning with New York, also so declares; ‘an antecedent or pre-existing debt constitutes value.’²

But it is conceived to be wrong to look at the case from the point of view of the common law. The question is one of law

¹ *Peacock v. Purcell*, 14 C. B. N. S. 728.

² N. I. L. § 32: ‘An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.’

merchant, which stands upon a footing of its own, to wit, custom; and hence whether there has been a valuable consideration according to the common law or not is an irrelevant question. The true question is, What is the custom of merchants? No rule touching the law merchant can permanently hold place which fetters or is opposed to custom; for it must rest upon essentially unsound theory.

Custom the
basis of doc-
trine.

Now transfer by a debtor to his creditor of a negotiable instrument, to pay or only to secure a prior debt, makes the creditor a holder for value by the custom. A debtor is justified so long as the debt lasts in making his creditor secure. The debtor's obligation to pay is an obligation which his property sooner or later must satisfy; and he is as much justified in putting his property—enough of it for the purpose—into his creditor's hands for security at the time of creating the debt, or afterwards, as well as by payment.

The situation is different where the security was passed to the creditor as a mere agent or bailee; such a distinction has well been taken.¹ The debtor himself in such a case is to be considered still as the real holder, for he can withdraw the security at will; the creditor, therefore, though having the security in his hands, is not in the legal sense the holder. Hence we have put the case as security transferred by the debtor to his creditor 'with full title,' though still as security. The situation of a trustee or assignee may also be excepted; such a person, though in virtue of his office a party with full title, and bound to perform certain duties, is by the current of authority treated as standing in the position of him from whom he received the instrument. He is not, according to the current of authority, a holder for value in mere virtue of his office of trustee or assignee.²

¹ See *Austin v. Curtis*, 31 Vt. 64; *Oates v. First National Bank*, 100 U. S. 239; *Bigelow's L. C. Bills and Notes*, 499, 500, 503.

² *Swan v. Crafts*, 124 Mass. 453; *Holland v. Cruft*, 20 Pick. 321, 338; *Palmer v. Thayer*, 28 Conn. 238; *Loos v. Wilkinson*, 110 N. Y. 195; s. c. 113 N. Y. 485; *Putnam v. Hubbell*, 42 N. Y. 106, 114; *Farrington v. Sexton*, 43 Mich. 454; *Main v. Lynch*, 54 Md. 658; *Eigenbrun v. Smith*, 98 N. C. 207. But see *Sipe v. Earman*, 26 Gratt. 563; *Olendorfer v. Myer*, 88

It is admitted, even under the New York doctrine, that the holder of paper taken as collateral security for a pre-existing debt is a holder for value against an accommodation party to the security.¹ That is a concession, so far, to the better doctrine.

The ground of the doctrine that transfer to a creditor imports value stands, it will be seen, without regard to the question Agreement to whether there has been any undertaking, express forbear. or implied, for forbearance by the creditor; it stands, indeed, though it be plainly understood that there is no agreement for forbearance. If, however, there be an agreement, express or implied, to forbear, the case is by so much strengthened; and all the authorities, those of the unwritten New York rule as well as the rest, agree that the creditor in such a case is a holder for value.² And such an agreement is deemed to be implied in a great many cases.³ Whether an implication of the kind arises depends somewhat upon the question whether the instrument taken as security is for the same amount as the original debt,⁴ or for a different sum, more or less. If the new security is for the same sum as the original debt, and is payable on time, there is a strong implication that the creditor agrees to forbear suit until the maturity of such security. And a like implication springs up where the new security is for a larger sum than the old debt.⁵

Va. 384; *Byrne v. Becker*, 49 Mo. 548; *Wilson v. Eifler*, 7 Cold. 31. Of course an assignee or a trustee *may* be a holder for value, for he may be a creditor or he may have parted with something of special value; but in his office merely he will take subject to equities, by the better rule. See *Bigelow, Fraud*, ii. pp. 450-456.

¹ *Grocers' Bank v. Penfield*, 69 N. Y. 502; *Maitland v. Citizens' Bank*, 40 Md. 540.

² See *Pratt v. Conan*, 37 N. Y. 440; *Moore v. Ryder*, 65 N. Y. 438, 442; *Burns v. Rowland*, 40 Barb. 368; *Oates v. First National Bank*, 100 U. S. 239.

³ See e. g. *Stuart v. Lancaster*, 84 Va. 772; *Blair v. Hoge*, 28 Gratt. 165, 171.

⁴ *Michigan Bank v. Leavenworth*, 28 Vt. 209.

⁵ *Atkinson v. Brooks*, 26 Vt. 569. It should be observed that it is *agreement* for forbearance which is spoken of; mere forbearance does not affect the case.

It is clear, too, that if the creditor parts in any other way with any right, his claim as a holder for value is still further strengthened.¹ Thus, the plaintiff is everywhere a holder for value when he has parted with the defendant's note, upon receiving from him a new note, indorsed by a third person,² or where the new security is transferred to the creditor upon his giving up an overdue note,³ or where the creditor receives the new security for the repayment of a loan of money upon another instrument,⁴ or where he receives it on account of the discontinuance of proceedings in execution against one of the parties to it and as security for the payment of the judgment in that case.⁵

Some authorities have professed to make a distinction between paper taken in conditional payment, and paper taken as collateral security, treating the holder as a holder for value, if he took in the first way, but not if he took in the second;⁶ but the distinction is not well taken, and has not found much favor.

It has generally been agreed that if the creditor received the paper in absolute payment or satisfaction of the debt, he is a holder for value.⁷ But so unusual are cases of that kind that it appears to be required in some States that an express agreement should be shown to establish the fact that the paper was so taken.⁸ That, however, in so far as it means an agreement formulated in terms, is con-

Conditional
payment and
security.

Instrument re-
ceived as pay-
ment.

¹ *Weaver v. Barden*, 49 N. Y. 286, 293; *Youngs v. Lee*, 12 N. Y. 551; *Essex Bank v. Russell*, 29 N. Y. 673.

² *Youngs v. Lee*, *supra*.

³ *Brown v. Leavitt*, 31 N. Y. 113.

⁴ *Bank of New York v. Vanderhorst*, 32 N. Y. 553.

⁵ *Boyd v. Cummings*, 17 N. Y. 101.

⁶ *Fletcher v. Chase*, 16 N. H. 38; *Rice v. Raitt*, 17 N. H. 116; *Nutter v. Stover*, 48 Maine, 163; *Austin v. Curtis*, 31 Vt. 64 (overruling *Atkinson v. Brooks*, 26 Vt. 569, and *Michigan Bank v. Leavenworth*, 28 Vt. 209); *Ryan v. Chew*, 13 Iowa, 589.

⁷ *Seymour v. Wilson*, 19 N. Y. 417; *Weaver v. Barden*, 49 N. Y. 286, 294.

⁸ *Brown v. Olmsted*, 50 Cal. 162; *Tobey v. Barber*, 5 Johns. 68; *James v. Hackley*, 16 Johns. 273. See *Peters v. Beverly*, 16 Peters, 532, 562.

trary to the analogies of the law, and the better authorities consider that sufficient evidence of any kind, otherwise proper, that the parties meant the transfer to operate as payment, may be received.¹

As for paper taken to secure a debt created at the same time, there can be no place ordinarily for question; the creditor has always been deemed a holder for value by all the authorities.² So too where any new credit or indulgence is given upon the faith of the new paper, that paper is held for value.³ Still even in such cases the situation will be changed if the security is not passed at the time to the credit of the creditor, but is only to be applied by him when paid, he in the meantime holding it only as agent of the debtor; for then, as we have already said, the debtor is the real holder.⁴

§ 4. EQUITIES: HOW SHOWN: THEIR NATURE.

The cardinal rule we have now reached is that a bona fide holder for value takes free from equities, or as it has already been expressed, purchase for value without notice cuts off equities. It makes no difference from whom the paper, if capable of being passed, was taken; it may have been taken from a thief; enough that the holder took it bona fide and for valuable consideration.

The existence of equities is to be shown by the defendant and fixed upon the plaintiff, after the plaintiff has made a presumptive case; and that, as we have seen, the plaintiff makes by producing the paper in evidence, duly indorsed when indorsement is necessary, and

¹ *Thompson v. Briggs*, 28 N. H. 40; *Smith v. Smith*, 27 N. H. 244; *Johnson v. Cleaves*, 15 N. H. 332; *Jaffrey v. Cornish*, 10 N. H. 505; *Gibson v. Tobey*, 46 N. Y. 637, 642.

² See *Stotts v. Byers*, 17 Iowa, 303; *Curtis v. Mohr*, 18 Wis. 615; *Logan v. Smith*, 62 Mo. 455.

³ *Housum v. Rogers*, 40 Penn. St. 190; *Washington Bank v. Krum*, 15 Iowa, 53.

⁴ See *Scott v. Ocean Bank*, 23 N. Y. 289.

proving the signatures.¹ In certain cases the defendant is helped out in his case by presumption ; in others he is not.

If the defendant can show that the instrument was obtained from him by fraud or by duress, or if he can show that it was tainted in the hands of the party who took it from him, with illegality, he makes out his case by presumption against the plaintiff ; for the law presumes on such a state of facts that the plaintiff is not the true holder, that the true holder is the man affected by the taint of fraud, duress, or illegality, and that he has merely turned the paper over to the plaintiff colorably for the purpose of suit.²

In other words, the law presumes, in such cases, that the plaintiff is at least not a holder for value ; and the plaintiff is now put to his proofs to sustain his claim. For example : The plaintiff is indorsee of a promissory note made by the defendants, and now sued upon. The defendants offer to show that the payee of the note illegally arrested them, and that this note was given to procure their release from duress, upon the promise of the payee to set them at liberty, which was accordingly done. They offer no other evidence ; nor does the plaintiff offer any evidence to meet it, and a verdict is taken for the defendants by consent, subject to the opinion of the court. The defendants' evidence is sufficient ; proof of duress by the payee would be a good defence against him ; and the presumption is that the payee, being guilty of illegal conduct, has placed the note in the hands of the plaintiff to sue upon it for him.³ Again : The plaintiff is indorsee, and the defendants are acceptors, of a bill of exchange now sued upon. The defendants offer to prove that the bill was accepted by them in payment of intoxicating liquor sold to them by the payees in violation of statute, and offer no other evidence. The plaintiff objects to the admissibility of the evidence, and the objection is sustained, and judgment rendered for the plaintiff. The ruling against

¹ Ante, p. 198. Statute in many States dispenses with the necessity of proving signatures the genuineness of which is not expressly denied.

² Grant v. Walsh, 145 N. Y. 502, 507. See notes to *Bedell v. Herring* 11 Am. St. Rep. 320.

³ Clark v. Pease, 41 N. H. 414.

receiving the evidence offered by the defendants is wrong; the evidence is proper and is sufficient to raise a presumption that the payees have put the bill into the hands of the plaintiff to sue upon it for them.¹

How far the plaintiff indorsee should go in the way of meeting the presumption is not quite clear. The authorities vary somewhat in the matter, at least in language. The plaintiff must at least show that he took the instrument for value; but what else is the question. Some authorities declare that he must also give in evidence the circumstances under which he took it. If that evidence does not indicate that he took the instrument with notice of the equity, and is believed, he will then, it is said, be entitled to recover.² In other words, according to this doctrine, it appears not to be required of the plaintiff, in answer to the evidence of fraud, duress, or illegality, that he should give evidence directly to the purpose of showing that he took without notice. But perhaps the better rule is that the plaintiff should show that he took the instrument in good faith, for value, and before maturity.³

In the case of other equities, such as want or failure of consideration, proof of their existence raises no presumption against an indorsee claiming to be a bona fide holder for value.⁴ The evidence would, therefore, be insuffi-

¹ *Paton v. Coit*, 5 Mich. 505; *Cases*, 311.

² See *Paton v. Coit*, 5 Mich. 505; *Cases*, 311. See *Hazard v. Spencer*, 17 R. I. 561; *Millard v. Barton*, 13 R. I. 605; *First National Bank v. Green*, 43 N. Y. 298, 300; *Grant v. Walsh*, 145 N. Y. 507.

³ 'The only effect of showing that the paper was fraudulently put into circulation would be to put upon the plaintiff the burden of showing that he took the paper in good faith, and for value, and before maturity.' *Shattuck v. Eldredge*, 173 Mass. 165, 170, *Barker, J.*; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570, 572. See further *Stewart v. Lansing*, 104 U. S. 505; *Hazard v. Spencer*, 17 R. I. 561; *Kenny v. Walker*, 29 Oreg. 41; *Owens v. Snell*, id. 483; *National Bank v. Miller*, 51 Neb. 156; *Campbell v. Hoff*, 129 Mo. 317; *Banks v. McCosker*, 82 Md. 518, 524; *Limerick Bank v. Adams*, 70 Vt. 132, 142; *Wing v. Ford*, 89 Maine, 140.

⁴ *Wilson v. Lazier*, 11 Gratt. 477; *Holden v. Phoenix Rattan Co.*, 168 Mass. 570, 572 (on the distinction between fraud and want of consideration). A fortiori of evidence that the defendant signed for accommodation, for that is not of itself an equity. *Duncan v. Gilbert*, 5 Dutch. 521; *Grant v. Ellicott*, 7 Wend. 227; *Knight v. Pugh*, 4 Watts & S. 445.

cient to meet the plaintiff's case; though his own case is only presumptive, for he has thus far given no actual evidence, other than by the production of the paper, that he is a bona fide holder for value. The defendant must accordingly go further, and give evidence either that the plaintiff took with notice of the equity in question or that he is not a holder for value.¹

Taking paper with notice, or without valuable consideration, subjects the taker, however, only to such equities as existed at the time he took it; if none then existed, his title will be good. It is then no defence that the holder took the paper after its maturity; the effect of so taking the paper is to subject him to equities existing against the holder at maturity, and if none exist he is entitled to recover. Negotiable paper does not lose its property of negotiability on passing its maturity.² Even accommodation paper known to be such may be transferred after maturity; though if so transferred by the party accommodated, it will carry notice of an equity, to wit, that the defendant loaned his credit only until the paper became due.³

It should also be observed that if the holder was a holder for value bona fide when he took the paper, he will remain such, though afterwards he may become aware of some equity which might have been set up against a prior holder. Indeed, as we have seen, it is no defence that the holder knew, when he took the paper, of the existence of an agreement between the defendant and the party next after him, under which equities then existed or have since arisen, if he had no knowledge of the equities when he took the paper.⁴ If, however, the holder made but part payment of the purchase price of the instrument, and

¹ See *Paton v. Coit*, supra; *Clark v. Pease*, 41 N. H. 414.

² *Leavitt v. Putnam*, 3 Comst. 494; *Cases*, 317.

³ *Chester v. Dorr*, 41 N. Y. 279; *Bower v. Hastings*, 36 Penn. St. 285; *Kellogg v. Barton*, 12 Allen, 527; *Cottrell v. Walkins*, 89 Va. 801; *Peale v. Addicks*, 174 Penn. St. 549. Further see *Charles v. Marden*, 1 Taunt. 224; *Sturtevant v. Forde*, 4 Man. & G. 101; *Caruthers v. West*, 12 Q. B. 143; *Jewell v. Parr*, 13 C. B. 909; *Story*, Notes, § 194.

⁴ *Patten v. Gleason*, 106 Mass. 439; *Berkeley v. Tinsley*, 88 Va. 1001.

before completing payment received notice of an equity, he cannot become a bona fide holder for value except in respect of his part payment.¹

It remains to consider what is meant by equities. The answer in general is plain enough; any facts which would be a defence to an ordinary simple contract of the common law, not being what we have called Absolute Defences, may be and commonly are called equities, — with one or two exceptions.

The exceptions are made by accommodation contracts of the law merchant. It is no defence to a suit upon a bill, note, or cheque, that the plaintiff took the paper with notice or even with direct knowledge that the defendant signed the same for accommodation, not doing so for the accommodation of the plaintiff; for he gave the use of his name and credit for the express purpose of enabling the party accommodated to get credit.² The case is as if the defendant had said to the plaintiff, 'If you will let this man have money I will see that you are paid;' the accommodation, unlike want or failure of consideration in the ordinary sense, is not an equity.

If, however, the instrument was used in substantial violation of the material terms, if any, upon which the accommodation was given, that will make a different case; such use would be a fraudulent diversion, would constitute an equity, in the face of which the plaintiff could recover only upon the footing that he was a holder in due course.³ For example: The plaintiffs are indorsees for value, and the defendant is accommodation indorser, of a promissory note now sued upon. The maker of the note was indebted to the plaintiffs, and in adjusting the debt the plaintiffs said that they would accept the defendant as surety. The defendant finally indorses the note for the accom-

¹ *Dresser v. Missouri Const. Co.*, 93 U. S. 92; N. I. L. § 61.

² *Grant v. Ellicott*, 7 Wend. 227.

³ *Shattuck v. Eldridge*, 173 Mass. 165. If one is to raise money on the paper for the lender of it, and then pledges the paper for one's own benefit, there is fraud. *Id.*

modation of the maker upon condition that a third person, who then held a note made by the defendant, deposited that note with another to be held by him until the defendant should be discharged from the indorsement. The condition was not complied with, and the facts were known to the plaintiff when he took the note. The plaintiff is not entitled to recover.¹

On the other hand if the diversion is not material, it will not affect the holder who takes the paper for value. The fact that the instrument is not used in precise conformity to the purpose for which the accommodation was given is not fraud. Indeed entire failure to comply with the direction *may* not be fraudulent, for the direction may appear to be incidental or immaterial. Thus accommodation paper which is to be discounted at a bank named, by direction of the party giving the accommodation, may be discounted elsewhere and the proceeds applied to other purposes than those intended, in the absence of fraud.²

The distinction between absolute defences and equities, after what has been said in the preceding chapter, will generally be plain. One case, however, already alluded to, *Filling blanks* should be stated with clearness here. *Alteration* ^{wrongfully.} of the instrument makes an absolute defence; to fill a blank space left in a *completed* instrument being an example. But to fill a blank space in an *uncompleted* instrument, — such as a promissory note signed in blank, — which has been put into the hands of a person who betrays the signer's confidence by filling the blank and delivering the instrument in violation of instructions, is not an alteration. It is or may be a fraudulent act, but it is not criminal, unless statute make it so. It is simply a case of agency in which the principal's confidence has been abused; but the act, notwithstanding its wrongfulness, binds the principal in favor of bona fide holders for value.³ It is only an equity.

¹ *Small v. Smith*, 1 Denio, 583. The transferrer would be liable in damages for any loss caused to the party whose confidence he has abused. *Nashville Lumber Co. v. Fourth National Bank*, 94 Tenn. 374; s. c. 27 L. R. A. 519 and note; 45 Am. St. Rep. 727.

² *First National Bank v. Wood*, 8 Texas Civ. Ap. 554.

³ *Angle v. Northwestern Ins. Co.*, 92 U. S. 330.

The rule of law upon this point may be thus stated: One who writes his name as maker, acceptor, drawer, or indorser, and intrusts the paper to another to fill up the contract and make him party to a negotiable instrument, thereby confers upon the person so intrusted, in favor of bona fide holders for value, the right to complete the contract at pleasure, so far as consistent with the instrument as written or printed at the time it is delivered to the person intrusted with it.¹

By the law merchant equities can arise only out of the transaction itself in which the defendant became a party to the paper.² Statute may, indeed, enable a defendant to avail himself of other claims against the immediate party thereto, by way of set-off; but unless the statute go further, these will not be equities, and will not be available against a later party, even though he took the paper (for value) with knowledge of the right of set-off,³ at least if the paper was taken by him before maturity. If it was taken after maturity, the contrary appears to be true, under some statutes.⁴

Finally an indorsee may recover in the face of equities known to him when he took the paper, and further though he took it without valuable consideration, if between him and the defendant there is one who was a bona fide holder for value, and the indorsee was not himself a party to any fraud or illegality affecting the instrument.⁵ The

¹ *Angle v. Northwestern Ins. Co.*, supra; *Whitmore v. Nickerson*, 125 Mass. 496; *Greenfield Bank v. Stowell*, 123 Mass. 196, 199, 203; *Blakey v. Johnson*, 13 Bush, 197; *Sittig v. Birkestack*, 38 Md. 158; *Ledwick v. McKim*, 53 N. Y. 307; *Burson v. Huntington*, 21 Mich. 415; *Van Etta v. Evenson*, 28 Wis. 33; *Yocum v. Smith*, 63 Ill. 321.

² *Hunlerth v. Leahy*, 146 Mo. 408; *Young Men's Gymnasium Co. v. Rockford Bank*, 179 Ill. 599.

³ See *Whitehead v. Walker*, 10 Mees. & W. 696; *In re Overend*, L. R. 6 Eq. 344; *Chandler v. Drew*, 6 N. H. 469; *Arnot v. Woodburn*, 35 Mo. 99; *Way v. Lamb*, 15 Iowa, 79.

⁴ *Baxter v. Little*, 6 Met. 7.

⁵ N. I. L. § 65; *Hascall v. Whitmore*, 19 Maine, 102. See also *Cromwell v. Sac*, 96 U. S. 51; *Marion v. Clark*, 94 U. S. 278; *Mornyier v. Cooper*, 35

defendant would be liable to such prior holder, and the plaintiff only stands in his place. For example: The plaintiffs are joint indorsees, and the defendant is maker, of a promissory note sued upon. There was no consideration between the original parties, and the note was not made for accommodation. One of the plaintiffs is a bona fide holder for value, the other took the note with notice of the want of consideration; but title is derived through others who were bona fide holders for value. The plaintiffs are entitled to recover.¹

§ 5. AMOUNT OF RECOVERY.

The question often arises where the holder, being a bona fide holder for value, has not paid the face or market value of the bill, note, or cheque, whether he is entitled to recover the face value or must be content with less, and if with less, how much less, assuming the existence of equities available against a prior holder. The question will depend upon the consideration whether the instrument was (1) bought outright or taken in absolute payment of debt, or (2) taken to secure or in conditional payment of debt.

Paper sold and
paper taken to
secure debt.

If the holder took the instrument in the first way, he is entitled, by the decided weight of authority, to claim the face value, though he may have paid much less for it, assuming, of course, that he is a bona fide holder for value.² The holder is entitled to recover the face of the instrument not only when he has bought the paper in the ordinary sense, as by discounting it, but also when he has taken it in pay-

Iowa, 257; *Boyd v. McCann*, 10 Md. 118; *Prentice v. Zane*, 2 Gratt. 262; *Lynchburg v. Slaughter*, 75 Va. 57; *Jones v. Wiesen*, 50 Neb. 243; *Bassett v. Avery*, 15 Ohio St. 299; *Woodworth v. Huntoon*, 40 Ill. 131; *Robinson v. Reynolds*, 2 Q. B. 196, 211. But see *Elwell v. Tatum*, 6 Texas Civ. Ap. 397.

¹ *Hascall v. Whitmore*, supra.

² *Fowler v. Strickland*, 107 Mass. 552; *Cromwell v. Sac*, 96 U. S. 51; *Dresser v. Missouri Ry. Co.*, 93 U. S. 92; *Moore v. Baird*, 30 Penn. St. 138; *Bange v. Flint*, 25 Wis. 544; *Lay v. Wissman*, 36 Iowa, 305; *Bailey v. Smith*, 14 Ohio St. 396; *Jones v. Gordon*, 2 App. Cas. 616, 622; *In re Gomersall*, L. R. 1 Ch. 137, 142. But see *Oppenheimer v. Bank*, 97 Tenn. 19, holding that in case of fraud (available against a prior holder) the plaintiff can recover no more than he paid for the instrument.

ment of property then sold, or in the course of a barter, or has given his negotiable security for it, provided it was received in absolute payment.¹ It matters not whether the defendant's contract was entered into for actual or supposed valuable consideration or for accommodation.²

Some authorities however hold that where the plaintiff paid less than the face value, he can, against one in whose favor equities exist which would be available against a prior holder, recover no more than he or some holder before him paid for the paper.³

If the holder took the paper to secure or in conditional payment of a debt, precedent or then newly created, obviously his claim, between him and his debtor, cannot be greater than the amount due on the debt ; ⁴ but it may be that the debtor himself had a claim for the full amount of the paper, notwithstanding the equities, and in that case his creditor, the holder, would be entitled to recover the face value, holding the excess above the debt in trust for the debtor.⁵ Or it may be that some prior holder might claim the face value of the instrument ; in such a case too the defendant owes the amount to some one, and it cannot matter to him who demands it, provided the person can give him a discharge.⁶ If however no one had a better claim upon the instrument than the debtor, the creditor will be entitled to recover no more than the amount of his debt ; assuming the existence of equities against the debtor.⁷

¹ *Dresser v. Missouri Ry. Co.*, supra ; *Woodruff v. Hill*, 116 Mass. 310.

² *Allaire v. Hartshorne*, 1 Zab. 665 ; *Williams v. Smith*, 2 Hill, 301 ; *Edwards v. Jones*, 2 Mees. & W. 414.

³ *Holcomb v. Wyckoff*, 35 N. J. 35 ; *Holman v. Hobson*, 8 Humph. 127.

⁴ See *Park Bank v. Watson*, 42 N. Y. 490.

⁵ *Lay v. Wissman*, 36 Iowa, 305 ; *Allaire v. Hartshorne*, 1 Zab. 665 ; *Chicopee Bank v. Chapin*, 8 Met. 40, 44.

⁶ *Allaire v. Hartshorne*, supra.

⁷ *Memphis Bethel v. Bank*, 101 Tenn. 130.

CHAPTER XVIII.

DISCHARGE OF SURETY: DEALINGS WITH PRINCIPAL DEBTOR.

§ 1. INDORSER AS SURETY: THE STATUTE.

IF the doctrines of the law pertaining to the contracts of guaranty and suretyship in regard to dealings with the principal debtor were confined to those two subjects, this chapter would be unnecessary; at any rate, it would only be necessary to say that dealings with the principal debtor have the same effect upon the contract of a guarantor or a surety in contracts of the law merchant as elsewhere in the law. But those doctrines are not confined to guaranty and suretyship; they apply to indorsement as well, indorsement itself being in reality a contract of assurance, though in a sense of its own; indeed, for the purposes in question, indorsement is often called a contract of suretyship. It is obvious that each indorser is then a surety, not merely for the maker or acceptor, but also for all parties before him; all prior parties, in other words, are principal debtors in relation to any particular indorser, and so the matter must be understood in this chapter.

Indorsement a
surety of law
merchant.

The fact should, therefore, be stated that dealings with the principal debtor which would have the effect to discharge a surety in the ordinary sense will have a like effect upon an indorser and all other parties secondarily liable.¹

The Statute puts the matter of discharging parties secondarily liable thus: A person secondarily liable on the instrument

¹ For convenience the word 'indorser' will often be used in the present chapter in a comprehensive sense, as including all parties secondarily liable.

is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder;¹ (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved.²

The present chapter will however treat only of dealings with the principal debtor, affecting the rights of the surety.

§ 2. SURRENDER OF SECURITIES.

One of the chief rules of suretyship is that the creditor must not surrender to the principal debtor securities placed in his hands to assure performance of the contract or payment of the debt, on the ground that the surety, in virtue of a doctrine of equity called subrogation, would be entitled to such securities for the same purpose in case he should be compelled to pay, or being bound to pay should pay voluntarily. The surrender of such securities, without the surety's consent, would therefore be a violation of the surety's rights, and hence would discharge him to the extent of his loss.³ That rule applies as well in favor of an indorser in the case of dealings of the kind between the holder of the paper and any party before the indorser.

§ 3. AGREEMENT FOR TIME: COMPOSITIONS: RESERVATION OF RIGHTS.

Another of the chief rules of suretyship is this: The creditor must not discharge the principal debtor, or make any binding

¹ No consideration is necessary for discharging the party.

² N. I. L. § 127.

³ *Shannon v. McMullin*, 25 Gratt. 211. See *Vose v. Florida B. Co.*, 50 N. Y. 369, 375.

agreement¹ with him to extend the time of performance agreed upon in the contract with the surety, without the surety's consent, unless (in cases where he may) he plainly reserves his rights against the surety. To give such a discharge, or to make such an agreement, without the reservation of rights, would discharge the surety. That rule also applies to indorsers and other parties secondarily liable; binding agreements of the kind, without consent of such parties and without a reservation of rights against them, operate as a discharge of their liability.²

In regard to discharges, the rule is that a discharge of any party to a bill, note, or cheque is a discharge of all subsequent non-consenting parties, not merely where the discharge granted in favor of the earlier party is effected by payment of the paper by him, but presumptively where it arises from mere agreement to compound or release liability. Payment of the paper extinguishes it, and hence the liability of all parties to it; agreement to compound discharges the party towards the holder, and so may well be treated as a presumptive discharge of all who follow as sureties for him. For example: The defendant is second indorser, with liability once duly fixed, and the plaintiff is holder of a promissory note. The plaintiff gives a discharge, without the defendant's consent, to the first indorser of the note, by contract under seal; that party's liability also having been duly fixed. The defendant is discharged.³

It is true that in such a case the defendant, if compelled to pay, would have recourse over against the prior party discharged; but the practical result of such recourse in most cases would be that the party who

Presumptive effect: reservation of rights.

¹ It is said that a mere agreement to extend the time of payment is valid on the ground that it implies a promise by the debtor to pay interest. *Nelson v. Flagg*, 50 Pac. R. 571. But see 2 *Daniel*, Neg. Inst. 1319 a; *Woodhall v. Streeter*, 39 S. W. 169 (Texas).

² N. I. L. § 127, supra. See *Shannon v. McMullin*, 25 Gratt. 211; *Dey v. Martin*, 78 Va. 1; *Exchange Bank v. Bayless*, 91 Va. 134; *Beacon Trust Co. v. Robbins*, 173 Mass. 261, 271, 274. In Massachusetts discharge of the maker under composition proceedings does not discharge indorsers, in virtue of statute. *Skillings v. Marcus*, 159 Mass. 51.

³ *Newcomb v. Raynor*, 21 Wend. 108.

gave the discharge would have to defend the suit, or would be liable for the amount of the judgment obtained. To hold, then, that that party cannot sue the later indorser prevents needless circuitry of action.¹ Still the resulting discharge of the later party is deemed presumptive only, and the presumptive intention may in some cases be rebutted. That may be accomplished by the holder's reserving his rights,² so far as he may, against the subsequent parties, as where the indorser himself is a party to the discharge granted to the earlier party.³ For example: The defendant is indorser with liability once fixed, and the plaintiff is holder, of a promissory note payable to A, who indorses it to the defendant, who indorses it to the plaintiff. The maker and A make a composition deed with their creditors, conveying all their estate to trustees, among them the defendant, and are discharged, the deed, however, containing a proviso that 'it shall not operate in favor of or be construed to release any persons or person who may be bound' for the maker or A, 'or who may have indorsed any note or notes drawn or indorsed by' both or either of them. The defendant, being a party to the composition deed, is not discharged.⁴

A like case would be made where the discharge arises from a merely personal agreement by the holder not to sue the party in whose favor the discharge runs; for in such a case the person so agreeing would not incur any liability if *another* should sue, and hence he would not have to defend suit brought by the later party against the one discharged by agreement, nor would he be affected in any way by judgment obtained by the plaintiff in such suit. True, the party discharged in that way might not gain much by the agreement, since a later party, compelled to pay, might sue him upon his indorsement or other contract; but that would be his own affair, and would not affect the case. The pre-

¹ Newcomb v. Raynor, 21 Wend. 108.

² Beacon Trust Co. v. Robbins, 173 Mass. 261, 271, 274.

³ Exchange Bank v. Bayless, 91 Va. 134.

⁴ Pannell v. McMechen, 4 Har. & J. 474. See also Beacon Trust Co. v. Robbins, 173 Mass. 261, 271, 274; Sohler v. Loring, 6 Cush. 537; Cases, 334; Morse v. Huntington, 40 Vt. 488; Hagey v. Hill, 75 Penn. St. 108; Overend v. Oriental Corp., L. R. 7 H. L. 348.

sumptive intention to discharge the later party would be duly rebutted.¹

It should be understood, however, that the composition deed, or other agreement to discharge, must not amount to a release in the technical sense of the common law. A re-
Release in technical sense.
 lease in that sense is a conveyance (by deed) of all the releasor's interest, as is shown by the English common law mode of conveying land by lease and release; and if a man has once conveyed away all his rights, there is nothing left for him to reserve. The attempted reservation would be repugnant to the deed, and hence would be void. If, however, the instrument, though in general form a release, can be construed an agreement not to sue, the reservation may be good.²

Indulgence is not enough, however long, within the period of limitation,³ even though the indorser suffer damage by reason of the delay.⁴ But express agreement is not neces-
Indulgence not enough.
 sary,⁵ and difficulty is encountered in some cases in determining whether the facts amount to an agreement for extension. That is apt to be the case where an additional security is taken from the principal debtor without any express understanding on the point of time. The effect of such a transaction is reached in certain cases by presumption.

How the courts have treated the taking of security may be shown by a few brief statements and one or two examples. Where the holder, at maturity of the paper in ques-
Taking security.
 tion, takes a further security due thereafter, for an amount equal to or greater than the debt, a presumption arises that it was understood that the time of payment of the paper al-

¹ Compare *Sohier v. Loring*, supra; *Kearsley v. Cole*, 16 Mees. & W. 128.

² *Sohier v. Loring* and *Kearsley v. Cole*, supra, explaining some of the cases.

³ *Way v. Dunham*, 166 Mass. 263.

⁴ *Allen v. Brown*, 124 Mass. 77.

⁵ It is enough that the surety has been led to change his position to his prejudice, by the plaintiff's conduct. *Way v. Dunham*, supra.

ready due was to be extended, at least where the security was, as it usually is, to be considered in satisfaction, if paid, of the paper thus secured. And the result will be that non-consenting indorsers are discharged, if rights against them have not been reserved. For example: The defendant is indorser, and the plaintiff holder, of a promissory note now sued upon, upon which the usual steps to fix the indorser's liability have been taken. At the maturity of the note the holder takes from the maker a draft on others payable six days thereafter, to be in satisfaction of the note if paid. The cheque is not paid when it comes due. The defendant is discharged from his liability on his indorsement, on the ground that presumptively the plaintiff agreed to extend the time of payment by the maker of the note for six days, and that there is nothing in the facts to overcome the presumption.¹ Again: The defendant is indorser, and the plaintiff holder, of a bill of exchange overdue, upon which the usual steps have been taken. After the bill becomes due the plaintiff takes part payment of the acceptor, and agrees to take a new acceptance from him payable at a future day for the rest, meantime keeping the bill in suit as security. This is presumptively an agreement to give time, and there being no evidence to rebut the presumption the defendant is discharged.²

As we have seen in the preceding chapter, the presumption appears to arise, if the collateral taken is due at a time subsequent to that of the paper so secured, whether the amount due in the collateral is as great as, or greater than, that of the paper secured. Possibly the presumption may be stronger where the amount is the same.³ Where the sum payable in the collateral is less than in the other, or where the new security is of a different character, as where the holder takes a mortgage for the payment of the sum thereafter, it has been suggested that no pre-

¹ *Okie v. Spencer*, 2 Whart. 253.

² *Gould v. Robson*, 8 East, 576. The later case of *Pring v. Clarkson*, 1 B. & C. 14, apparently contra, was not well decided, and has generally been repudiated. See *Kendrick v. Lomax*, 2 Crompt. & J. 405; *Okie v. Spencer*, *supra*.

³ See *Michigan Bank v. Leavenworth*, 28 Vt. 209; *Atkinson v. Brooks*, 26 Vt. 569. But that is by no means clear.

sumption for extension of time of the note or bill arises.¹ So where the new security is not given in place or on account of the paper in suit, but as a mere pledge, the title being retained by the debtor, so that the creditor in taking the security is a mere trustee or agent of the debtor for collecting it and applying the money on the note or bill in suit, the presumption, it seems, does not arise.²

Again, it is not enough that there is even express agreement for extension of time (or for discharge); the agreement must have been valid, in order to work a discharge of the indorser. For example : The defendant is in-
dorser and the plaintiffs are holders of a bill of Agreement for time must have been valid. exchange, the steps for fixing liability having been duly taken. Afterwards one of the plaintiffs applies to the drawer of the bill for payment, and threatens to sue immediately if an arrangement is not made to pay the bill. The drawer then proposes to the plaintiff that if the plaintiff will indulge him four or five weeks, he himself will certainly pay the bill. The plaintiff agrees, and does not inform the defendant, but the drawer does not pay the bill, though the time of indulgence has passed. The defendant is not discharged, the agreement being without consideration.³

Indeed it seems that the indorser is not discharged by an agreement for delay, though the agreement is valid, if still the indorser could not have had recourse against the party to whom the indulgence was given, for between those two the situation is not one of principal and surety. Such would be the case where the party granted indulgence was a bankrupt in law at the time. For example : The defendant is indorser, and the plaintiff holder, of a promissory note, steps being duly taken. At the maturity of the note the plaintiff enters into a valid, binding agreement with the maker, then a discharged bankrupt, without the defendant's knowledge, by which the plaintiff agrees not to sue the maker for two months. The defendant is

¹ See *United States v. Hodge*, 6 How. 279.

² *Austin v. Curtis*, 31 Vt. 64.

³ *McLemore v. Powell*, 12 Wheat. 554.

not discharged, because the indulgence could not prejudice him, the defendant having no recourse under the bankruptcy laws against the maker.¹

Where the agreement, of whatever nature, made with the principal debtor is in writing, as usually it is, the reservation of rights must be in writing also, by reason of the written agreement and reservation. rule which excludes parol evidence to vary a written contract.² There appears to be no reason, however, why the whole agreement for discharge or giving time, together with the reservation of rights, where permissible, may not be oral.

There can be no reservation of rights either in the cases already referred to, where there has been a payment of the instrument, or where the party attempting to reserve right to reserve. would be liable over to the party discharged or indulged if that one were sued by the later party; or in any case in which the rights of the indorser might be prejudiced if he were to be held as still liable. A case of the kind would occur where the holder surrendered securities to which the indorser would be entitled on payment, a case already referred to.³

§ 4. REQUEST TO SUE.

Another important rule of suretyship prevails in many States,⁴ but not in all, to wit, that the surety may request the creditor, when the time of performance comes on, to bring suit; failing to heed which request will have the effect to discharge the surety to the extent of any detriment he might thereby sustain, as where there was property of the debtor within reach at the time, which afterwards disappeared. That rule, it seems, applies to indorsers; that is, an indorser whose liability has been fixed, or who has waived the taking of the usual steps, may, where the rule just stated prevails, require

¹ *Tiernan v. Woodruff*, 5 McLean, 350.

² *Hagey v. Hill*, 75 Penn. St. 108.

³ *Id.*; *Mayhew v. Boyd*, 5 Md. 102.

⁴ By statute in some States.

the holder to sue any prior party bound to pay, on pain of discharging such indorser to the extent of any loss he may sustain by failing to sue as requested.

§ 5. ACCOMMODATION CONTRACTS.

The foregoing doctrines govern not only indorsement, but all other engagements which are on their face, or are known to be,¹ secondary, such as accommodation undertakings. Extending
For example: The defendant is one of two joint time.
makers of a promissory note, having joined for accommodation, of which fact the plaintiff, holder of the note, was aware when he took it. Without the defendant's consent the plaintiff has made a binding agreement with the principal joint maker for an extension of time. The defendant is discharged.²

Formerly, indeed, the situation of an accommodation party to a note, bill, or cheque was likened in general to that of an ordinary surety. But the later authorities show Accommoda-
that the likeness is not general; they declare that tion party as
an accommodation acceptor or maker will not be surety.
discharged by any agreement, however valid, to extend the time of payment or to give a discharge from liability to the party for whom the accommodation was given, where the accommodated party is liable under a distinct and different kind of contract, such as an indorsement. It makes no difference that the agreement was made with knowledge of the accommodation, at least if the holder had no notice of the fact when he took the paper. For example: The defendant accepts a bill of exchange for the accommodation of the drawer, and the plaintiff becomes holder of the bill in due course, for value, and without notice of the accommodation. Afterwards he is informed of the nature of the acceptance, and later still enters into a valid agreement

¹ Evidence of knowledge of the suretyship may be given. *Hitchcock v. Frackelton*, 116 Mich. 487. It may be shown that one of two or more makers of a note signed as surety to the holder's knowledge, 'not for the purpose of showing that the maker is not liable as he contracted to be, but to show that it would be inequitable to permit the payee to vary the terms of the contract or imperil the rights of the surety by an extension' of time. *Hitchcock v. Frackelton*, supra.

² *Barron v. Cady*, 40 Mich. 259.

not to sue the drawer, discharging him from liability. That does not discharge the defendant.¹

That proceeds upon the ground that the holder is entitled to treat the parties as liable according to the contract which they have actually made. The plaintiff, in such a case as that of the example, has presumably bought the paper in reliance upon the contracts as they appear thereon, and that has given to him a right which cannot be taken away without his consent. Consent he has not given. Indeed the case would appear to be the same in principle, though he had had knowledge of the accommodation when he bought the paper, for it would still be presumable that he bought it relying upon the several contracts as they appear on the paper. And so the modern authorities hold.²

§ 6. AGREEMENT FOR TIME WITH STRANGER.

An agreement for time or the like, if made with one not a party to the paper, and not with the person in whose favor it is made, would not in any case, it is held, have the effect to discharge later parties. The holder has, indeed, in such a case, bound himself not to sue the particular party; but that party could not enforce the agreement or set it up in bar of an action against him.³

§ 7. GROUND OF DOCTRINE.

The doctrines above presented do not rest upon the ground that there was any agreement, express or implied, in the original contract, whereby the indorser or other party was to be discharged, in case the holder should do any of the things mentioned. They rest upon grounds of equity or of statute, or, it may be, in some instances of special though doubtful views of the common law. And, let it be repeated, they apply in favor of all persons secondarily liable, within the limitations stated.

¹ *Farmers' Bank v. Rathbone*, 26 Vt. 19; *Cases*, 342.

² *Id.*; *Fentum v. Pocock*, 5 Taunt. 192 (overruling *Laxton v. Peat*, 2 Camp. 185, and *Collott v. Haigh*, 3 Camp. 281); *Price v. Edmonds*, 10 B. & C. 578, 584; *Nichols v. Norris*, 3 B. & Ad. 41; *Harrison v. Courtauld*, *id.* 36; 3 Kent, 104.

³ *Frazer v. Jordan*, 8 El. & B. 303.

CHAPTER XIX.

PAYMENT.

§ 1. GENERAL RULE: THE STATUTE: PRESUMPTIVE
PAYMENT: SURRENDER.

PAYMENT and surrender of a negotiable bill of exchange, promissory note, or cheque, made at the right time, to the right person, by the right person, will extinguish the liability of all parties to the instrument.¹ Pay-
ment of an unnegotiable bill, note, or cheque made
at any time, and proper in other respects, has the same effect. It will not be necessary to say anything more on the subject in regard to unnegotiable instruments.

Extinction of
entire instru-
ment.

The Statute puts the general rule thus: A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) by the

¹ Taking a bill, note, or cheque for debt should not be confused with the present subject. To take a note for debt *suspends* the remedy on the debt. *Kearslake v. Morgan*, 5 T. R. 513. Hence if the creditor sues for the debt, and not on the note, it is for him to show that the note has become unavailable without his fault. See *Harvard Law Rev.*, Jan. 1900, p. 409, referring particularly to suit on the original consideration of altered notes. See *Maguire v. Eichmeier*, 80 N. W. R. 395 (Iowa); *Davis v. Reilly*, 1898, 1 Q. B. 1, bill of exchange given for price of goods; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 413, that a cheque taken on account is not payment unless so intended.

Payment by the maker or acceptor will not stop the Statute of Limitations from running in favor of an indorser. *Maddox v. Duncan*, 143 Mo. 613.

principal debtor becoming the holder of the instrument at or after maturity in his own right.¹ Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof, in good faith and without notice that his title is defective.²

Further, under the Statute the holder may expressly renounce his rights against any party to the instrument before, at, or after maturity.³ An absolute and unconditional renunciation of his rights against the principal debtor, made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. The renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.⁴

Payment may, in certain cases, be shown by *prima facie* presumption. Thus, possession of paper *after* maturity raises a presumption of the kind towards parties secondarily liable, especially if the paper, with an indorsement upon it, is then found in the hands of and taken from the maker or acceptor, or even of the drawee of a bill who had not accepted it.⁵ Indeed between several makers of a promissory note, or acceptors of a bill of exchange, possession by one of them after maturity is *prima facie* evidence against the others of payment by him.⁶

But the presumption, being *prima facie*, may be rebutted. Indeed the drawee of a bill of exchange or a cheque may prove to be the holder of it, and as such entitled to maintain an action upon it; for, instead of accepting, he may have discounted the bill. For example: The plaintiffs, being drawees of a bill of exchange now sued upon, and bearing the indorsement of the defendants, *discount* it in favor of the payees (defendants) before it becomes due, not being bound to accept it. At its maturity

¹ N. I. L. § 126.

² *Id.* § 95.

³ See *Edwards v. Walters*, 1896, 2 Ch. 157. No consideration is necessary any more than for striking out an indorsement.

⁴ N. I. L. § 129.

⁵ *McGee v. Prouty*, 9 Met. 547; *Eckert v. Cameron*, 43 Penn. St. 122

⁶ *McGee v. Prouty*, 9 Met. 547.

the drawer has no funds in their hands, the bill is dishonored, and the usual steps are taken to fix the liability of the defendants. The plaintiffs are entitled to recover; their act of discounting the bill being proper, and not amounting to a payment of it.¹

Unexplained, however, an act of that kind has sometimes been looked upon *prima facie* as payment, extinguishing the liability of all the parties; though, as will be noticed, the case put is one of possession obtained *before* maturity. According to such a rule, it would be presumed that the paper must have been in the hands of the drawee, in the ordinary course of business, either for acceptance or after payment.² Hence, until the transaction was explained, neither such drawee nor any subsequent holder with notice could be treated as a holder in due course. The like rule would apply to the maker of a note or the acceptor of a bill. But that view has been denied, and the position taken that, though the party primarily liable, for example, the maker of a note, offers the paper indorsed for discount, there is no presumption, from the fact that the paper is in his hands, that it has been paid. The proper inference, it is thought, is that the paper was indorsed for the accommodation of the one offering it, and was left in his hands to enable him to raise money by it; at any rate there would be nothing to fix upon the purchaser notice of payment.³ And that appears to be the true view.

While the paper remains in the hands of the maker or acceptor, however, such party cannot sue upon it, obviously; for if he were to recover on the footing of an indorsee suing an indorser, the latter could at once maintain an action against him in turn as maker or acceptor. But the drawee of a bill, not having accepted, is not in such a position; *he* might either transfer the paper, or, as we have seen, sue upon it, after having

¹ *Swope v. Ross*, 40 Penn. St. 186; *Cases*, 361.

² *Central Bank v. Hammett*, 50 N. Y. 158. But see *Witte v. Williams*, 8 Rich. N. s. 290, 305.

³ *Eckert v. Cameron*, 43 Penn. St. 120; *Witte v. Williams*, *supra*; *Smith v. Weston*, 159 N. Y. 194; *Morley v. Culverwell*, 7 Mees. & W. 174; *Harmer v. Steele*, 4 Ex. 1.

duly discounted it. The distinction then should be noticed between the purchase of paper and the payment of it.¹

Taking a new promissory note in renewal of an old one, or it seems in renewal of liability upon any other instrument, amounts presumptively to payment or discharge of the instrument first given, in the absence of any indication to the contrary in the writings themselves. But the presumption is a *prima facie* one only, and hence may be overturned, as for instance by evidence that the understanding of the parties was that there should be only an extension of time, or by evidence of mistake.² Hence if the second instrument should be invalid, and the first valid, the holder it seems, by surrendering the second, would be remitted to his rights upon the first. Indeed it has been held that, where the first instrument, being valid and binding, has been surrendered and extinguished, so that the holder cannot be restored to the status quo ante, he may sue upon the second one, if to do so would not be wrongful or in violation of some specific law.³

In certain cases it appears to be necessary that the payment should be accompanied or directly followed by surrender of the instrument, even in cases in which there could be no danger from a further transfer, that is, even though payment has been made at or after maturity. It appears to be necessary sometimes that the maker or acceptor should actually take up the paper; only by so doing is he acting 'in due course,' or according to the law merchant. Such action is

¹ The Statute notices the distinction thus: 'Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties,' etc. N. I. L. § 128. See *Hartzell v. McClurg*, 54 Neb. 316; *Chappell v. McKeough*, 21 Col. 275; *Dodge v. Freedmen's Savings Co.*, 3 Otto, 379; *Harbeck v. Vanderbilt*, 20 N. Y. 395.

² *In re Utica Brewing Co.*, 154 N. Y. 268; *Lyndonville Bank v. Fletcher*, 68 Vt. 81 (the renewals in this case were forgeries).

³ *Bank v. Sneed*, 97 Tenn. 120; *Wireback v. First National Bank*, 97 Penn. St. 543; renewal by person now non compos. See *Moulton v. Camroux*, 2 Exch. 489, aff'd 4 Exch. 489; *Lancaster Bank v. Moore*, 78 Penn. St. 407.

treated as necessary where payment is made, at whatever time, to one who, having an apparent title, is not in fact the true owner, or authorized to act for the true owner.¹

If in such a case as that payment is made in good faith at or after maturity, and the instrument is surrendered accordingly, the party paying, that is, the maker or acceptor, will be discharged, and with him all other parties to the instrument. This proceeds upon the ground that, the instrument being payable to bearer originally, or afterwards indorsed in blank, any one in possession of it is presumptively the owner ; but as it is possible that the person in possession may have no right to the instrument, the party paying should require the paper to be delivered up to him as the final assurance of his discharge. If he should fail to do so, taking instead, for instance, a receipt for the money, with an undertaking for the return of the instrument thereafter, the true owner, any time before such return, could enforce another payment.²

¹ Where the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable thereon to the holder. N. I. L. § 189. But payment of any one part, according to the law merchant, is payment of the whole. Id. § 190.

² Upon this whole subject see *Wheeler v. Guild*, 20 Pick. 545. In that case the payment was made *before* maturity, and the decision, therefore, is not in strictness an authority in respect of payment made at or after maturity. There may then be some doubt upon the point. But the language of the court is intended to cover both cases. 'If a bill,' said Shaw, C. J., 'be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder mainly on the ground of his possession of the bill ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment, and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be in his own wrong ; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money.' . . .

§ 2. AT THE RIGHT TIME.

Payment then, in and of itself, operates to discharge all parties only when made at the right time, which means at or after maturity. Payment may indeed be made before maturity, and will operate as a discharge to all parties liable thereon, against all subsequent holders who have notice of the fact ; or if the paper is taken up, as it should be, and destroyed, or not afterwards put into circulation again, payment before maturity will operate as a discharge. But the paper, if not taken up, may wrongfully be put into circulation again after such payment, and then if it should fall into the hands of a bona fide holder for value before maturity *his* claim would not be affected by the payment.¹ This supposes that payment is made to the real owner of the paper, or to one authorized to receive it for him.

§ 3. TO THE RIGHT PERSON.

In the next place, the payment, to be effectual against another demand, must be made to the right person.² All that that means, however, is that, if it is in other respects according to law, it should be made to one apparently entitled to receive the money, not that it must be made to the true owner. It may be that the person receiving the money is not entitled to it; he may even have stolen the instrument ; that will be the misfortune of the owner, and he must lose his money, provided that the payment is made, in good faith, at or after maturity, and is accompanied by a surrender of the paper, as we have seen.³ But if the maker, acceptor, or drawee has notice that the person calling for payment is not entitled to receive it, he will pay at his peril. Payment made to the true owner, at or after maturity, extinguishes all liability without any surrender of the instrument.

¹ See *Wheeler v. Guild*, 20 Pick. 545.

² See *Davis v. Miller*, 14 Gratt. 1.

³ *Wheeler v. Guild*, *supra*.

§ 4. BY THE RIGHT PERSON.

Lastly, payment must be made by the right person, or on the right person's behalf. The meaning of the statement is, that it should be made by, or on behalf of, him who is primarily, or in another sense ultimately, bound to pay and take up the paper. Hence 'payment,' so-called, by the drawer of an accepted bill, or by an indorser, to obtain his own discharge, is not payment at all, in the proper sense of extinguishing the paper, unless it is further made on behalf of the maker, acceptor, or drawee.¹ Thus an acceptor sued for payment cannot set up, by way either of full or of partial defence, that payment, of whatever amount, has been made by the drawer, unless he can further show that the payment was made in satisfaction and extinguishment of the bill.² To discharge the drawer or any other party is not to discharge the acceptor.

Payment by party primarily liable: 'payment' by indorser.

That, however, supposes that the acceptance was not for the drawer's accommodation. An accommodation party is not the one ultimately bound to take up the paper; the party accommodated must do that. Hence an acceptor (or maker) for accommodation could set up payment made by the party accommodated, whether it was made professedly on behalf of the accommodation party or not,³ and even though the accommodated person be not a party to the instrument.⁴ That proceeds upon the ground that the accommodation party is only a surety for the party for whose accommodation he signed, and that payment by the principal debtor is payment by the surety and all others concerned.

If however the whole sum due was paid by the party accommodated, in purchasing his release, it matters not whether the holder to whom he has paid it had notice of his relation to the maker or acceptor or not; not more than nominal damages at any rate could, thereafter, be recovered against such accom-

¹ *Madison Square Bank v. Pierce*, 137 N. Y. 444.

² *Jones v. Broadhurst*, 9 C. B. 173; *Randall v. Moon*, 12 C. B. 261.

³ *Cook v. Lister*, 13 C. B. n. s. 543.

⁴ *Cottrell v. Watkins*, 89 Va. 801.

modating maker or acceptor. If, however, the accommodated party made but part payment of the sum due, the rest could be recovered in any case against the maker or acceptor, assuming that such payment was not made in satisfaction and discharge of the paper.¹

Payment in such cases, it should be added, includes release from liability. Thus, to release the drawer of a bill for whose accommodation it had been accepted would release the acceptor; absolutely, if it was made on behalf of the acceptor or for the purpose of extinguishing the bill, or to the extent of the sum paid for the release, if it was not, and the holder had notice of the accommodation.²

§ 5. PAYMENT FOR HONOR.

Besides payment in the sense of the foregoing paragraphs there may be what is called payment of bills of exchange for honor; which is a very different thing. The practice of intervention for honor, already described where the intervention is by way of acceptance,³ does not prevail to the extent of custom in this country. On the subject of *payment* for honor the Statute makes the following provisions: —

Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable on the instrument, or for the honor of the person for whose account it was drawn.⁴

Not matter of custom in this country.

The Statute.

The payment for honor *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it.⁵

The notarial act of honor must be founded on a declaration made by the person paying for honor or by his agent in that behalf, declaring his intention to pay the bill for honor and for whose honor he pays.⁶

¹ *Cook v. Lister*, 13 C. B. N. s. 543; *Thornton v. Maynard*, L. R. 10 C. P. 695. Further see Bigelow's L. C. Bills and Notes, 664 et seq.

² See *Farmers' Bank v. Rathbone*, 26 Vt. 19; *Cases*, 342.

³ *Ante*, pp. 7, 61.

⁴ N. I. L. § 178.

⁵ *Id.* § 179.

⁶ *Id.* § 180.

Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.¹

Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the person paying for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.²

Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse against any party who would have been discharged by such payment.³

The person paying for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive the bill itself and the protest.⁴

¹ N. I. L. § 181.

² Id. § 183.

³ Id. § 182.

⁴ Id. § 184.

CHAPTER XX.

CONFLICT OF LAWS.

§ 1. GENERAL DOCTRINE.

QUESTIONS of the conflicting laws of different States and countries are common enough to require attention in a concluding chapter of this book. Such questions relate to the liability (1) of maker or acceptor, (2) of drawer or indorser; they will be considered in that order.

Subject for consideration: intention of parties.

There is, however, a general doctrine of the conflict of laws, applicable in one way or another to all the contracts of paper of the law merchant, which may be thus stated: The contract, whether as a whole or in part, is governed by the law which the parties actually or presumptively intended should govern, if the intention was not illegal.¹

It should be understood, at the same time, that that is a very modern way of stating the general doctrine, a way reached only after much doubt and tentative effort. Statements of the law, in the older books, and now and then in the more recent ones, will be found at variance with it. But the pressure of business is strong towards freedom of contract, and it is sound theory in the law to follow business. This idea has not always prevailed. It has indeed been common in the past to say that the law which governs is the *lex loci contractus*, or, where performance is to be had in another State or country, the *lex loci solutionis*; ² but

¹ *Hamlyn v. Talisker Distillery*, 1894, A. C. 202; *Law Quarterly Rev.* 1894, pp. 290, 291.

² 'Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights, either under the

that the law of the place where the contract was made, or where it is to be performed, does not always prevail is now well settled.¹ That, in reality, is the meaning in part of the separation of the subject into the two branches above designated; different rules prevail, by the better authorities, in regard to questions of liability of parties primarily liable and of parties secondarily liable.

§ 2. MAKER OR ACCEPTOR.

First, then, of the conflict of laws touching the liability of maker or acceptor.

Consider in the first place the question of the plaintiff's title under an indorsement in another State than that of the holder, the law of indorsement being different in the two ^{Various cases} States; which law is to govern? The test, it ^{put.} seems, will be this: Did the title pass by indorsement according to the law contemplated, when the indorsement was made? For example: A promissory note is made by the defendant in another State, payable to the order of A. A writes upon it in that State, 'I hereby assign this note to B,' signing his name, which is proper indorsement there, but not in the State in which suit is brought or in which B lives. There is no evidence that A did not intend to indorse according to the law of the State in which he acted. The title is duly passed to the plaintiff. Again: A promissory note is made and indorsed abroad, or in some other State than that in which the holder and plaintiff resides and sues, there being a conflict of laws between the two States, in regard to the holder's title. In such a case presumptively the law of the State or country in which the indorsement was made will govern; if it was not good by that law, though it would be

whole or any part of the contract, should be determined.' Herschel, L. C., in *Hamlyn v. Talisker Distillery*, *supra*, at p. 207. The House of Lords was unanimous that the *intention* should govern unless the intention was opposed to the public policy of the country whose law was contemplated as governing. In determining the intention both the *lex loci solutionis* and the *lex loci contractus* are of importance; but neither is conclusive. *Id.* Further see *Corbin v. Planters' Bank*, 87 Va. 661; *Fant v. Miller*, 17 Gratt. 47; *Woodruff v. Hill*, 116 Mass. 310.

¹ *Hamlyn v. Talisker Distillery*, *supra*.

good by the domestic law, the plaintiff will not be entitled to recover.¹

Suppose that a promissory note was made in the State or country of the holder and of the forum, and that it is payable there, but that it has been indorsed abroad, there being the same conflict of laws as that last mentioned. Now, the title of the plaintiff, according to recent and well-considered authority, will depend upon the question whether the indorsement would pass a title by the *domestic* law.² That law must naturally have been the one contemplated by the parties; there is nothing on the face of such an instrument to indicate that the parties contemplated that it might come under the operation of foreign law; it is made and payable at home. The fact that it happens to be in circulation in a foreign State cannot affect the question of the plaintiff's title.³

Suppose that the note is made abroad, that it is payable in the State of the holder, and that it is indorsed by the payee abroad. In that case it is plain that the parties contemplated that the note would be indorsed abroad, where it was made; and hence the holder must have acquired title by the foreign law. Here, in principle then, the law of the place of contract governs.

Once more suppose that the subject of litigation is a bill of exchange, that the bill was drawn abroad, accepted and payable in the State of the holder, and then indorsed where drawn. That makes a somewhat more complex question, and to solve it correctly this fact must be remembered, that the liability of the drawer and that of the acceptor go hand in hand; if the drawer cannot be made liable, the acceptor could not on payment charge the sum against him. The question then should be, whether the drawer is liable by the indorsement, or rather whether the holder has acquired a title which is good against the drawer of

¹ *Trimbey v. Vignier*, 1 Bing. N. C. 151. Long after this case was decided it was found out that the foreign law had been mistaken. *Bradlaugh v. De Rin*, L. C. 3 C. P. 538; s. c. 5 C. P. 473. But the principle applied was correct.

² *Lebel v. Tucker*, L. R. 3 Q. B. 77.

³ *Lebel v. Tucker*, L. R. 3 Q. B. 77, Lush, J. See *Woodruff v. Hill*, 116 Mass. 310; *Everett v. Vendryes*, 19 N. Y. 436; *Story, Conflict of Laws*, p. 442, 8th ed.

the bill; and that question, it is clear, must be decided by the law of the State or country in which the bill was drawn, unless it appears that the law of some other country was contemplated. There is nothing to indicate that any foreign law was in mind. The bill will probably be indorsed where it is drawn; hence the law of the State or country in regard to the validity of the indorsement will govern in the suit against the acceptor.¹

Consider in the next place the question simply of the liability of the maker or acceptor, not of the plaintiff's title, where the instrument is made payable in another State than that where it was made or accepted. Now presumptively the law of the place of payment, the *lex loci solutionis*, will govern. Greater weight is given, on the question of intention, to the place of payment; and if nothing is to be done at the place of making or accepting the instrument, plainly the parties intend the place of payment, and that will govern.²

In regard to questions of interest, usury, and damages, in an action against the maker or the acceptor, the law of the State or country in which the note or bill is payable accordingly governs, unless there is indication that some other law was contemplated.³ The mere fact then that the contract would, for example, be usurious by the law of the State in which it was made, would not necessarily require the courts, even of that State, to treat it as usurious; the question would everywhere be whether it was usurious by the law of the State in which it was made payable. However, if it should turn out that the making the instrument payable in some other State than that in which it was made was a mere subterfuge of the parties, to evade the usury laws of their own State, the contract would be treated as usurious.⁴ And it has been held that the same would be true in case such contracts

¹ *Bradlaugh v. De Rin*, *supra*.

² *Hamlyn v. Talisker Distillery*, 1894, A. C. 202, 208, 212.

³ *Railroad Co. v. Ashland*, 12 Wall. 226; *Dickinson v. Edwards*, 77 N. Y. 573; *Hibernia Bank v. Lacombe*, 84 N. Y. 367, 377; *Hunt v. Hall*, 37 Ala. 702. In Massachusetts, non-stipulated interest and damages are treated as matters of the remedy, and are accordingly governed by the law of the place of suit, the *lex fori*. *Ayer v. Tilden*, 15 Gray, 178. But that is plainly wrong. *Ex parte Heidelberg*, 2 Lowell, 526.

⁴ Story, *Conf. Laws*, pp. 442, 443, 8th ed.

were declared absolutely void by the laws of the State in which they were made.¹

§ 3. DRAWER OR INDORSER.

Next, of the conflict of laws touching the liability of drawer or indorser.

In regard to presentment and demand, the law of the place of performance governs the question of time;² and that because the drawer and the indorsers are sureties, in a broad sense, for the acceptor and the maker. But whether presentment and demand are necessary, in the absence of waiver, and whether the steps taken, if taken at the right time, were properly taken, the law of the place of indorsement governs.³

In regard to protest and notice, the place of the drawing or the indorsement furnishes the governing law upon a question of the necessity of these steps;⁴ while the law of the place of payment probably governs upon a question of the mode of taking the steps and of the time of making presentment. Thus, in regard to the first of these questions, suppose a bill of exchange payable after date, drawn in Pennsylvania to the order of a citizen of New York, payable in the latter State, and indorsed by the payee, were dishonored on presentment for *acceptance*. In such a case it would not be necessary to notify the drawer, and it would be useless to do so, because of the local law of Pennsylvania;⁵ while the contrary would be true in regard to the payee-indorser, residing in New York, because of the general law merchant. In regard to the second

¹ *Akers v. Demond*, 103 Mass. 318.

² *Aymar v. Sheldon*, 12 Wend. 439; *Chatham Bank v. Allison*, 15 Iowa, 357; *Rouquette v. Overmann*, L. R. 10 Q. B. 525. But see *Hatcher v. McMorine*, 4 Dev. 122, 124.

³ *Aymar v. Sheldon*, *supra*; *Allen v. Merchants' Bank*, 22 Wend. 215; *Thorp v. Craig*, 10 Iowa, 461; *Short v. Trabue*, 4 Met. (Ky.) 299; *Hunt v. Standart*, 15 Ind. 33 (overruling *Shanklin v. Cooper*, 8 Blackf. 41); *Huse v. Hamblin*, 29 Iowa, 501; *Douglas v. Bank*, 97 Tenn. 133. But see *Dunn v. Adams*, 1 Ala. 527, as to protest and *quære*.

⁴ See *Douglas v. Bank*, 97 Tenn. 133, *demand* and notice.

⁵ *Read v. Adams*, 6 Serg. & R. 356. See also *Horne v. Rouquette*, 3 Q. B. Div. 514.

question it will be enough to say, for instance, that if a deputy of a notary public were authorized to act by the law of the place of payment, he might so act, though it should appear that by the law of the place of indorsement the notary must act in person; and if by the law of the place of payment four days of grace were allowed, presentment must be made on the fourth day, to be followed by the other steps accordingly, whatever the law of the place of indorsement, for the liability of the drawer and indorsers depends upon that of the acceptor or maker. But the time when notice of dishonor should be given or sent is governed, it seems, by the law of the place of indorsement.¹

Where indorsement is made in a State or a country in which the law merchant has been changed or does not prevail, the question of the liability of the indorser, otherwise than Special rules as above considered, will be governed by the law of of law. such State or country. Thus, in some States indorsers are not liable merely upon the taking of the steps required by the law merchant; the holder must first bring suit against the maker or acceptor, and endeavor to obtain payment from him, unless such suit would be useless. The law of the place of indorsement would govern in such cases.²

In regard to the amount recoverable from a drawer or an indorser, the fact that they are looked upon as sureties of the acceptor or maker indicates the extent of their Amount recoverable. liability and the governing law. The surety is liable for the sum which the principal debtor fails to pay, no more and no less; and hence, in principle and by the weight of authority, the governing law is the law of the place governing the contract of the acceptor or maker.³ The statement and

¹ *Horne v. Rouquette*, 3 Q. B. Div. 514, casting doubt upon *Rothschild v. Currie*, 1 Q. B. 43, 49, a case much cited.

² *Williams v. Wade*, 1 Met. 82; *Short v. Trabue*, 4 Met. (Ky.) 299; *Trabue v. Short*, 18 La. An. 257; *Trabue v. Short*, 5 Cold. 293; *Dundas v. Bowler*, 3 McLean, 397, 400. But see *Coffman v. Bank of Kentucky*, 41 Miss. 212.

³ *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 N. Y. 573. See *Rouquette v. Overmann*, L. R. 10 Q. B. 525; *Wayne Bank v. Low*, 81

rulings sometimes made that the law of the place of indorsement governs in such a case is believed to be incorrect.¹ Payment by the principal debtor, that is, of the sum due by the law governing his own contract, will always discharge the surety.

§ 4. PROCEDURE AND REMEDY.

The mode of procedure, whether for instance by attachment or not, the jurisdiction of the court, whether the Statute of Limitations or the Statute of Frauds applies, these *Lex fori* governs. and other questions of the mode of procedure and of the remedy, are governed by the law of the State in which the suit is brought, the *lex fori*; unless statute otherwise provides.² Intention plays no part here.

N. Y. 566, 570 ; *Hildreth v. Shepard*, 65 Barb. 269. Several cases contra in New York have been overruled.

¹ There are several such decisions, mostly however by intermediate courts. They are founded more or less upon *Gibbs v. Fremont*, 9 Ex. 25, *Allen v. Kemble*, 6 Moore, P. C. 314, 321, and *Cooper v. Waldegrave*, 2 Beav. 282, 285. Concerning the last named case see the remarks of Cockburn, C. J., in *Rouquette v. Overmann*, *supra*. And further see Story, *Conflict of Laws*, pp. 442, 443, note, 8th ed. ; *Bills of Exchange Act*, § 72.

² There has always been more or less doubt whether the defence of the Statute of Limitations is a matter of procedure (or remedy) or of substantive right ; and in many States the bar of the foreign law is a bar in the State of the suit, either by statute or by doctrine as to the nature of the bar. See *Collins v. Manville*, 170 Ill. 615. Contra, *Orear v. First National Bank*, 97 Ga. 587.

NEGOTIABLE INSTRUMENTS LAW.

[THE STATUTE HERE GIVEN IS THAT OF NEW YORK. THE POINTS WHERE THERE ARE OR ARE LIKELY TO BE DIFFERENCES OF LEGISLATION ARE INDICATED. THE STATUTE HAS BEEN COLLATED WITH THAT OF COLORADO, AND THE VARIATIONS NOTICED, BY WAY OF SUGGESTING DIFFERENCES TO BE LOOKED FOR.— *General Laws of New York, 1897, chap. 612; Laws of Colorado, 1897, chap. 64.*]

ARTICLE I.

GENERAL PROVISIONS.

§ 1. THIS Act shall be known as the Negotiable Instruments Law.

§ 2. In this Act, unless the context otherwise requires:

‘Acceptance’ means an acceptance completed by delivery or notification.

‘Action’ includes counter-claim and set-off.

‘Bank’ includes any person or association of persons carrying on the business of banking, whether incorporated or not.

‘Bearer’ means the person in possession of a bill or note which is payable to bearer.

‘Bill’ means bill of exchange, and ‘note’ means negotiable promissory note.

‘Delivery’ means transfer of possession, actual or constructive, from one person to another.¹

‘Holder’ means the payee or indorsee of a bill or note,² who is in possession of it, or the bearer thereof.

‘Indorsement’ means an indorsement completed by delivery.

‘Instrument’ means negotiable instrument.

‘Issue’ means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

‘Person’ includes a body of persons, whether incorporated or not.

‘Value’ means valuable consideration.

‘Written’ includes printed, and ‘writing’ includes print.

¹ See ante, p. 13.

² Why not cheque also ?

§ 3. The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other persons are 'secondarily' liable.

§ 4. In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

§ 5. Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 6. The provisions of this Act do not apply to negotiable instruments made and delivered prior to the passage hereof.¹

§ 7. In any case not provided for in this Act the rules of the law merchant shall govern.

ARTICLE II.

FORM AND INTERPRETATION.

§ 8. An instrument to be negotiable must conform to the following requirements:—

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand, or at a fixed or determinable future time.
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

§ 9. The sum payable is a sum certain within the meaning of this Act, although it is to be paid:

1. With interest; or
2. By stated instalments; or

¹ Colorado Statute, 'Prior to the taking effect of this Act.' § 195.

3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 10. An unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or

2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

§ 11. An instrument is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable:

1. At a fixed period after date or sight; or

2. On or before a fixed or determinable future time specified therein; or

3. On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 12. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 13. The validity and negotiable character of an instrument are not affected by the fact that: —

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 14. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight,¹ or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

§ 15. The instrument is payable to order where it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or
2. The drawer² or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

§ 16. The instrument is payable to bearer:

1. When it is expressed to be so payable; or

¹ But see Mass. Stats. 1899, chap. 130.

² The statute originally read 'drawee.' Amendment, 1898, chap. 336,

2. When it is payable to a person named therein or bearer ;
or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable ; or

4. When the name of the payee does not purport to be the name of any person ; or

5. When the only or last indorsement is an indorsement in blank.

§ 17. The instrument need not follow the language of this Act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

§ 18. Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

§ 19. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 20. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course ; but as to him, the date so inserted is to be regarded as the true date.

§ 21. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order however that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be

filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated¹ to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 22. Where an incomplete instrument has not been delivered, it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.

§ 23. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.² And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

§ 24. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:—

1. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of inter-

¹ Amendment, 1898, ch. 336, § 4, for 'negotiable.'

² After 'valid delivery thereof' the words 'if any' or the like should have been inserted. Or emphasize 'valid.' See ante, p. 13

est, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election.¹

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 25. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

§ 26. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

§ 27. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized;² but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

§ 28. A signature by 'procuration' operates as notice that

¹ A bill of exchange drawn upon the drawer is, in legal effect, a promissory note. *Davis v. Clarke*, 6 Q. B. 16; *Cases*, 45, 47; ante, p. 51, note 1.

² Qu. whether, in virtue of the words 'if he was duly authorized,' the agent is liable on the instrument, where he was not authorized? The statute leaves a doubt where there was none before.

the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.¹

§ 29. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

§ 30. Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE III.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

§ 31. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

§ 32. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value,² and is deemed such whether the instrument is payable on demand or at a future time.

§ 33. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ 34. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ 35. Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial

¹ There is probably no custom in this country of signing 'per procurationem.' On legislation in advance of custom, see ante, p. 7.

² Differences in the statutes should be looked for here. Ante, pp. 242-247

failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

§ 36. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.

NEGOTIATION.

§ 37. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery.

§ 38. The indorsement must be written on the instrument itself, or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 39. The indorsement must be an indorsement of the entire instrument.¹ An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 40. An indorsement may be either special or in blank; and it may also be either restrictive, or qualified, or conditional.

§ 41. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 42. The holder may convert a blank indorsement into a

¹ See ante, p. 90, as to partial indorsement by *accommodation* parties

special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 43. An indorsement is restrictive, which either :

1. Prohibits the further negotiation of the instrument ; or
2. Constitutes the indorsee the agent of the indorser ; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 44. A restrictive indorsement confers upon the indorsee the right :

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 45. A¹ qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

§ 46. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 47. Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery ; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

§ 48. Where an instrument is payable to the order of two

¹ Amendment 1898, chap. 336, § 8.

or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

§ 49. Where an instrument is drawn or indorsed to a person as 'cashier' or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

§ 50. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 51. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 52. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 53. Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§ 54. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 55. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 56. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer.¹ But for the purpose of determining

¹ Sed qu. of the right to have indorsement, except upon proof that such was the actual intention. See ante, p. 85, note. Perhaps there may be a right to indorsement without recourse or warranty, so as to give the transferee legal title; but even that is doubtful. The Colorado Statute rightly adds, 'if omitted by mistake, accident, or fraud.' Chap. 64, § 49, Laws 1897.

whether the transferee is a holder in due course the negotiation takes effect as of the time when the indorsement is actually made.

§ 57. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this Act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.

RIGHTS OF HOLDER.

§ 58. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

§ 59. A holder in due course is a holder who has taken the instrument under the following conditions : —

1. That it is complete¹ and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

§ 60. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

§ 61. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

§ 62. The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument, or any signature thereto, by fraud, duress, or force

¹ The instrument is 'complete,' in the sense of a completed contract, only after delivery. *Ante*, p. 13.

and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud.

§ 63. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.¹

§ 64. A holder in due course holds the instrument free from any defect of title of prior parties and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 65. In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

§ 66. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.

LIABILITY OF PARTIES.

§ 67. The maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

§ 68. The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be ac-

¹ The statutes may differ here. See *ante*, pp. 233-237.

cepted and ¹ paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

§ 69. The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

§ 70. A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ 71. Where a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as indorser, in accordance with the following rules:—

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

§ 72. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine, and in all respects what it purports to be;

2. That he has a good title to it;

3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate trans-

¹ Sic. The word of course should be *or*.

feree. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities other than bills and notes.

§ 73. Every¹ indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things in subdivisions one, two, and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.

§ 74. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 75. As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

§ 76. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section seventy-two of this Act,² unless he discloses the name of his principal and the fact that he is acting only as agent.

ARTICLE VII.

PRESENTMENT FOR PAYMENT.

§ 77. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the

¹ This seems to include agents indorsing only in collection, e. g. a collecting bank, overturning the distinction in *United States v. American Bank*, 70 Fed. Rep. 232. See *National Park Bank v. Seaboard Bank*, 114 N. Y. 28.

² See Amendment, 1898, ch. 336, § 10.

instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose,¹ such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

§ 78. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

§ 79. Presentment for payment, to be sufficient, must be made :

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible to any person found at the place where the presentment is made.

§ 80. Presentment for payment is made at the proper place :

1. Where a place of payment is specified in the instrument, and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented;
3. Where no place of payment is specified, and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment.²
4. In any other³ case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

§ 81. The instrument must be exhibited to the person from

¹ The words 'and . . . purpose' are not in the New York Statute as at first passed, but are inserted by Amendment, 1898, chap. 336, § 11. The Colorado Statute does not contain the words.

² As to preference of the place of business, see ante, p. 110.

³ Amendment, 1898, chap. 336, § 12.

whom payment is demanded, and when it is paid must be delivered up to the party paying it.¹

§ 82. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

§ 83. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

§ 84. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them even though there has been a dissolution of the firm.

§ 85. Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 86. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 87. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 88. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

§ 89. Presentment for payment may be dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this Act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

¹ But suppose he does not require it, and that it is not delivered up? See ante, p. 273.

§ 90. The instrument is dishonored by non-payment when :

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid.

§ 91. Subject to the provisions of this Act, when the instrument is dishonored by non-payment an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

§ 92. Every negotiable instrument is payable at the time fixed therein, without grace.¹ When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable² on Saturday³ are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment⁴ before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 93. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date⁵ of payment.

§ 94. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.⁶

§ 95. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof, in good faith and without notice that his title is defective.

¹ Grace is restored in Massachusetts on sight 'drafts and bills of exchange.' 1899, chap. 130.

² The words 'or becoming payable' inserted 1898, chap. 336, § 13. They are not in the Colorado Statute.

³ For the word 'Saturday' the Colorado Statute reads 'any day in any place where any part of such day is a holiday.'

⁴ For the rest of the sentence the Colorado Statute reads 'during reasonable hours of the part of such day which is not a holiday.'

⁵ Sic, for *day*.

⁶ The more general rule.

ARTICLE VIII.

NOTICE OF DISHONOR.

§ 96. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 97. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

§ 98. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

§ 99. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 100. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 101. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

§ 102. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ 103. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument

and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ 104. Notice of dishonor may be given either to the party himself or to his agent on that behalf.

§ 105. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 106. Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

§ 107. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§ 108. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 109. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this Act.

§ 110. Where the person giving and the person to receive notice reside in the same place,¹ notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;

2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.²

§ 111. Where the person giving and the person to receive

¹ The term 'place' clearly needs definition, though it is the term commonly used in the unwritten law merchant.

² Suppose it take more than a day for the mail?

notice reside in different places, the notice must be given within the following times: —

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter;

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail if it had been deposited in the post-office within the time specified in the last subdivision.

§ 112. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

§ 113. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department.

§ 114. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

§ 115. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: —

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.¹

But where the notice is actually received by the party within the time specified in this Act, it will be sufficient though not sent in accordance with the requirements of this section.

§ 116. Notice of dishonor may be waived either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

§ 117. Where the waiver is embodied in the instrument

¹ A change in the law, see ante, p. 162.

itself, it is binding upon all parties ; but where it is written above the signature of an indorser, it binds him only.

§ 118. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.

§ 119. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 120. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence.¹ When the cause of delay ceases to operate, notice must be given with reasonable diligence.

§ 121. Notice of dishonor is not required to be given to the drawer in either of the following cases :

1. Where the drawer and drawee are the same person ;
2. Where the drawee is a fictitious person or a person not having capacity to contract ;
3. Where the drawer is the person to whom the instrument is presented for payment ;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument ;
5. Where the drawer has countermanded payment.

§ 122. Notice of dishonor is not required to be given to an indorser in either of the following cases :

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument ;
2. Where the indorser is the person to whom the instrument is presented for payment ;
3. Where the instrument was made or accepted for his accommodation.

§ 123. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary unless in the meantime the instrument has been accepted.

¹ But suppose the notice is given by one not ' the holder.'

§ 124. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 125. Where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

§ 126. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 127. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless¹ the right of recourse against such party is expressly reserved.

¹ The Colorado Statute here inserts 'made with the assent of the party secondarily liable, or,' § 120, 6.

§ 128. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ 129. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 130. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority.

§ 131. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ 132. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment

is specified,¹ or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.

BILLS OF EXCHANGE: FORM AND INTERPRETATION.

§ 133. A bill of exchange is an unconditional order in writing addressed by one person to another,² signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or³ determinable future time a sum certain in money to order or to bearer.

§ 134. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

§ 135. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

§ 136. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

§ 137. Where in a bill the⁴ drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

§ 138. The drawer of a bill or any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such a person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

¹ Nor if the place added be that designated by law.

² Drawer and drawee may be the same person. See § 137.

³ Amendment, 1898, ch. 336, § 25.

⁴ The word 'the' inserted 1898, chap. 336, § 15.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

§ 139. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee.¹ It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 140. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored.

§ 141. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.²

§ 142. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 143. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 144. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow,³ to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 145. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept or by non-payment. But when a bill payable after sight

¹ 'Drawer' in original statute. See 1898, chap. 336, § 27.

² But suppose the separate sheet is attached to the bill?

³ If the holder allow more than twenty-four hours, secondary parties will presumptively be discharged.

is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

§ 146. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

§ 147. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

§ 148. An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

§ 149. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

§ 150. Presentment for acceptance must be made :

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument ;

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

§ 151. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§ 152. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee ¹ or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative.²

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ 153. A bill may be presented for acceptance on any day on

¹ 'Drawer' in original statute. See 1898, chap. 336, § 30.

² The presentment in question being for *acceptance*, why make it to the personal representative? He has no authority to accept, and his signature, being that of a stranger, not the drawee, would not be acceptance. See ante, p. 51.

which negotiable instruments may be presented for payment under the provisions of sections seventy-nine and ninety-two of this Act.¹ When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.²

§ 154. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 155. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases: —

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where, after the exercise of reasonable diligence, presentment cannot be made;

3. Where although presentment has been irregular, acceptance has been refused on some other ground.

§ 156. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 157. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 158. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

¹ Amendment, 1898, ch. 336, § 17.

² For the last sentence the Colorado Statute reads, 'When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday.' § 146.

ARTICLE XIII.

PROTEST OF BILLS OF EXCHANGE.

§ 159. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

§ 160. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

§ 161. Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.¹

§ 162. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

§ 163. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

¹ Observe that the statute makes no distinction, except in order of terms, between a notary and 'any respectable resident.'

§ 164. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 165. Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security¹ against the drawer or indorsers.

§ 166. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 167. Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.²

§ 168. Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon or for the honor of the person for³ whose account the bill is drawn.⁴ The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

§ 169. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

¹ Qu. of the existence of any such custom in this country?

² On this subject see the remarks *ante*, p. 7.

³ Amendment, 1898, ch. 336, § 28.

⁴ May the drawee accept for honor? See *ante*, p. 62.

§ 170. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 171. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§ 172. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 173. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 174. Where a dishonored bill has been accepted for honor *supra* protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 175. Presentment for payment to the acceptor for honor must be made as follows:—

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section One Hundred and Eleven.¹

§ 176. The provisions of section Eighty-eight apply where there is delay in making presentment to the acceptor for honor or referee in case of need.²

§ 177. When the bill is dishonored by the acceptor for honor, it must be protested for non-payment by him.

¹ Amendment, 1898, ch. 336, § 18.

² *Id.* § 19.

ARTICLE XV.

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.¹

§ 178. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 179. The payment for honor supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it.

§ 180. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf, declaring his intention to pay the bill for honor and for whose honor he pays.

§ 181. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 182. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 183. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 184. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

§ 185. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

¹ See the remarks ante, p. 7

§ 186. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

§ 187. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills.

§ 188. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

§ 189. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

§ 190. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

ARTICLE XVII.

PROMISSORY NOTES AND CHEQUES.

§ 191. A negotiable promissory note within the meaning of this Act is an unconditional promise in writing made by one person to another,¹ signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 192. A cheque is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

¹ The maker may make the note payable to his own order, as the next sentence but one shows.

§ 193. A cheque must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 194. Where a cheque is certified by the bank on which it is drawn, the certification¹ is equivalent to an acceptance.²

§ 195. Where the holder of a cheque procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

§ 196. A cheque of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the cheque. •

[In the New York Statute, an article follows concerning Notes given for Patent Rights and for a Speculative Consideration.]

¹ 'Certificate' in original statute. Amendment, 1898, chap. 336, § 29.

² What does 'acceptance' as to a cheque signify? It certainly is not the same thing as acceptance of a bill of exchange. It is a misleading term.

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